

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

1-1-2009

## Sharing Stories: Narrative Lawyering in Bench Trials

Paul Holland

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Courts Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Paul Holland, Sharing Stories: Narrative Lawyering in Bench Trials, 16 *CLINICAL L. REV.* 195 (2009).  
<https://digitalcommons.law.seattleu.edu/faculty/299>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

# SHARING STORIES: NARRATIVE LAWYERING IN BENCH TRIALS

PAUL HOLLAND\*

*This article extends narrative lawyering theory to the generally neglected subject of bench trial litigation. Closely examining three trials—one contract dispute and two criminal cases—and drawing on recent research into judges’ cognitive habits, the Article explores the special challenges lawyers face when trying a case to a judge. The feedback that judges give during bench trials—often intended, sometimes unconscious—requires lawyers to be as deft in processing information as they are thoughtful and effective in presenting it. Judges’ familiarity with the substance of the law and the rituals and customs of trials require lawyers to be especially creative if they are to avoid having their story stamped as just another version of a routine the judge has been through before. The three profiled trials provide a wealth of examples of the peculiar difficulties lawyers face in bench trials, the perils of failing to appreciate them, and the narrative possibilities most likely to be effective in this distinctive setting.*

## INTRODUCTION

I once watched a talented defense attorney attempt to convince a juvenile court judge that his client had nothing to do with the drugs the police had allegedly found in the back seat of their squad car after transporting the client to the station. Arguing a point of law mid-trial, the defender slipped, asserting that the court would have to rule in his favor “if this was a real trial.” Of course, this lawyer meant to say “jury trial,” and did not intend to so baldly question the legitimacy of the proceedings. This gaffe<sup>1</sup> exemplifies a widely-shared view that bench trials are inferior, even insubstantial, when compared to jury trials. The common practice of referring to bench trials as “nonjury trials” reflects this cultural ordering. This mindset has real consequences: recent research has shown that lawyers are generally una-

---

\* Associate Professor and Associate Dean for Academic Affairs, Seattle University School of Law. I wish to thank Professors Randy Hertz, John Mitchell, and Robert Chang and Judge (retired) Robert Alsdorf for their thoughtful comments upon drafts of this Article. I received invaluable research assistance from Associate Librarian Kerry Fitz-Gerald and law student Stephanie Gilfeather. Finally, thanks to Deans Kellye Testy and Annette Clark for the support that made the production of this article possible.

<sup>1</sup> See Michael Kinsley, *Gaffes to the Rescue*, TIME, Feb. 19, 2007, at 80 (“Meanwhile, a gaffe, it has been said, is when a politician tells the truth—or more precisely, when he or she accidentally reveals something truthful about what is going on in his or her head.”).

ware of and, when made aware, largely indifferent to data showing that for more than a decade federal judges acquitted defendants at higher rates than juries did.<sup>2</sup> It was as if these bench trials were somehow not real, not meaningful. Because so many cases—a majority of all criminal trials and a third of all felony trials in one recent study<sup>3</sup>—are resolved by bench trial, it is insufficient to view bench trials primarily in terms of what they lack (i.e., jurors) and necessary to focus on what they present: a set of distinctive interactions between lawyers and judges that demands a distinctive lawyering approach.

Narrative lawyering theory provides a framework for evaluating these interactions and constructing such an approach. “A particularly useful way of understanding much of what lawyers do in litigation,”<sup>4</sup> narrative lawyering theory is founded upon an appreciation of the role that stories play in the cognitive processes by which humans make sense of experience.<sup>5</sup> Research has shown that jurors organize their thoughts about a case and arrive at their judgment through stories. They do not merely choose between the stories offered by the lawyers; they construct a story that fully captures their experience of the trial.<sup>6</sup> Lawyers seeking maximum influence over this process must consider the narrative implications of all the decisions they make or actions they take throughout the trial.<sup>7</sup>

Bench trials have not received sustained attention from narrative lawyering theorists,<sup>8</sup> but recent research demonstrating that judges

---

<sup>2</sup> Andrew Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 219 (2005) (“[E]ven among lawyers who have learned of the rate gap, several expressed doubts that they would dramatically alter their practices. When asked why, some lawyers still insisted that juries were better for the defense. . . .”).

<sup>3</sup> Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 459, 755, 767-68 (2004) (analyzing data from 23 states from 1976 to 2002).

<sup>4</sup> Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 4 (2005).

<sup>5</sup> See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); JEROME BRUNER, *ACTS OF MEANING* 86 (1990); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

<sup>6</sup> Pennington, *supra* note 5, at 523 (“When we hypothesize that jurors impose a narrative organization on evidence, we mean that jurors engage in an active, constructive comprehension process in which evidence is organized, elaborated, and interpreted by them in the course of the trial.”).

<sup>7</sup> See Alper, *supra* note 4, at 119 (“Recent legal scholarship on story-telling in litigation thus suggests the extent to which an advocate’s decisions about most basic aspects of trial conduct—pretrial maneuvers, opening and closing statements, presentation of evidence, and even behavior in the courtroom—implement strategic judgments about the nature of the story s/he will communicate to the fact-finder.”).

<sup>8</sup> See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 587-88 (1998) (“[T]here is no empirical (or even anecdotal) basis for assessing the kinds of narra-

employ similar cognitive processes (and are prone to the same fallacies) as the general population<sup>9</sup> suggests that judges are likely to be equally, if peculiarly, dependent upon story structures for making sense of the information presented at trial. Examining three recent bench trials, this Article illuminates how the narrative processes of advocate and audience are both enmeshed and intensified in bench trials. The enmeshed, or intertwined, nature of bench trial narratives is most apparent in the moments when judges explicitly respond to, interfere in, or even supplant lawyers' efforts to tell their stories. Bench trials present a stark contrast to jury trials, in which "there is no verbal or non-verbal feedback between the speaker(s) and the audience."<sup>10</sup> The bilateral nature of bench trial communication means that lawyers must be both performer and audience,<sup>11</sup> alternating roles frequently, sometimes within the span of a breath or a gesture. The heightened intensity of bench trial narratives is fueled by judges' ability, due to their experience and training, to seize on the gaps or weaknesses in lawyers' trial storytelling.<sup>12</sup> Familiarity with the trial process also equips judges to interpret lawyers' decisions in light of patterns of which jurors would be unaware. In sum, bench trial narratives emerge from a process of joint creative control<sup>13</sup> that requires lawyers to make adjustments at every stage of the trial.

Part I of this Article introduces some of the fundamental elements of narrative lawyering theory and then sketches the bench trials

---

tive approaches that are likely to prevail in a bench trial."); cf. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 8 (1999) (asserting that the theory of lawyer performance "applies with equal force to bench and jury trials.").

<sup>9</sup> See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) [hereinafter Guthrie, *Blinking*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) [hereinafter Guthrie, *Judges Ignore*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie, *Inside*].

<sup>10</sup> Albert Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 278 (1989).

<sup>11</sup> Mark Aronson has identified a similar dual perspective in the context of counseling clients. Mark Aronson, *We Ask You To Consider: Learning About Practical Judgment in Lawyering*, 4 CLIN. L. REV. 247, 284 (1998) ("[T]o be effective lawyers often have to be actors and spectators at the same time.").

<sup>12</sup> See Sean Doran, John D. Jackson & Michael Seigel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 40 (1995) ("[A]s counsel you feel that academically you are pinned more to the tip of your collar than in a jury case. There's just you and him and you've got to be on your toes, as it were, academically and intellectually because there's no waffle.").

<sup>13</sup> Herbert A. Eastman captures this sense of joint yet dual attachments when he described how a close reading of civil rights pleadings showed that "[t]he lawyer's meaning and the judge's meaning are not coterminous, but shared." Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 765, 799 (1995).

to which the theory will be applied. This Part also identifies the individual and collective characteristics that make the selected cases appropriate subjects for drawing general conclusions. Parts II-IV analyze the profiled cases, building a comprehensive framework of narrative dynamics across the stages of a bench trial. Part II focuses on opening statements, where the lawyers begin their storytelling. Bench trial openings bear substantial formal similarity to their jury trial analogs. However, narrative analysis of the openings in the cases under review demonstrates that the greater intensity of bench trials is detectable, if not always obvious, from the outset. In all three cases,<sup>14</sup> the lines drawn at the time of opening establish patterns that mark the interactions between lawyers and judges throughout the entire trial. Part III explores how judges often reveal their developing conception of the trial's story through their involvement in witness examinations and evidentiary arguments. The judges in the three cases demonstrated sharply different degrees of involvement, but each communicated strongly. Part IV examines the moment when the narratives of lawyer and judge can most directly be joined: closing argument. Formally, closing presents the clearest distinction between bench and jury trials. Jurors must, of course, remain silent during closing and are admonished to withhold judgment until they begin deliberating as a group. Judges, who, of course, deliberate alone and often decide cases immediately, may jump in during closing with questions and comments. Bench trial closing thus becomes a dialogue, simultaneously a microcosm and a culmination of the joint process of the entire trial. The closings in the trials under review offer powerful lessons about narrative at this critical stage and at every moment leading up to it. Part V offers (1) suggestions for procedural reform to improve the quality and uniformity of bench trial communication and (2) ideas for lawyer training and practice that meet the specific demands bench trials impose.

## I. NARRATIVE THEORY AND BENCH TRIALS: BRIEF SKETCHES

### A. *An Introduction to Narrative Theory*

The claim that narrative "means constructing and telling stories and includes the rhetorical creation of an imaginative world in which the story can happen"<sup>15</sup> might well scare off a lawyer preparing for a bench trial. "Surely," this lawyer might say, "the judge will not be interested in or even tolerant of my 'stories,' let alone my 'creation of

---

<sup>14</sup> The lawyers in one trial waived opening, but this was as meaningful in constituting the trial's narrative dynamics as the openings delivered in the other two cases were.

<sup>15</sup> Alper, *supra* note 4, at 4.

an imaginative world.’ I can hear the judge now, ‘Save it for your jury trials, counsel.’” However understandable, this temptation must be resisted. Firmly rooted in the science of perception,<sup>16</sup> narrative theory offers lawyers useful tools for approaching any case and persuading any audience. Psychological research has demonstrated that jurors process and interpret trial information through the unconscious use of constructs such as schemas<sup>17</sup> and “stock scripts.”<sup>18</sup> As people do in everyday activities, jurors use schemas—i.e., standard mental categories—as filters, directing their attention to specific items within the potentially overwhelming flow of trial data. Having organized the information by use of a familiar pattern, jurors can then make sense of it.<sup>19</sup> A script is a dynamic schema, one in which individuals play customary roles in a conventional setting.<sup>20</sup>

Narrative lawyering theorists have advanced our understanding of how lawyers’ trial performances engage these cognitive processes. In their frequently-cited analysis of closing arguments in a homicide jury trial, Professors Anthony Amsterdam and Randy Hertz explain the mechanics of the arguments in terms of their macrostructure and microstructure.<sup>21</sup> “Macrostructure” refers to the way in which a lawyer’s argument (1) constructs a relationship between the lawyer and the jury and (2) defines, albeit often implicitly, the jurors’ task.<sup>22</sup> In the closings that Amsterdam and Hertz examine, defense counsel sought a dialogue between lawyer and jury, while the prosecutor’s argument cabined the jurors into a more passive role, receiving the evidence and the argument.<sup>23</sup> These constructs aligned with the lawyers’ objectives. The prosecutor wanted the jurors to move quickly from the undisputed (and largely unexplained) fact that the defendant shot the victim to a finding of intent and, thus, of guilt. Defense counsel hoped to encourage the jurors to explore and consider a wider range

---

<sup>16</sup> *Id.* at 5 (“[N]arrative is ‘a primary and irreducible form of human comprehension.’”) (quoting Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *THE WRITING OF HISTORY: LITERARY FORM HISTORICAL UNDERSTANDING* 129, 132 (Robert H. Canary & Henry Kozicki eds., 1978)).

<sup>17</sup> Moore, *supra* note 10, at 279 (“[A] schema is a category in the mind which contains information about a particular subject.”).

<sup>18</sup> Alper, *supra* note 4, at 7 (asserting that such scripts “provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds”).

<sup>19</sup> Moore, *supra* note 10, at 279-81.

<sup>20</sup> See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 132 (3d ed. 2007) (describing the varying and somewhat overlapping ways in which the terms “script” and “dynamic schema” are used).

<sup>21</sup> Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

<sup>22</sup> *Id.* at 78.

<sup>23</sup> *Id.* at 78, 80-82.

of possibilities, even in the absence of a single compelling exculpatory explanation.

In a series of articles devoted to the macrostructure of a single closing argument in a racketeering trial,<sup>24</sup> Philip Meyer has employed narrative analysis to show the freedom trial lawyers have to occupy the vast space between the two approaches Amsterdam and Hertz described. Drawing on modern screenwriting precepts, Meyer shows how the lawyer he profiles led the jury through “sequences of scenes”<sup>25</sup> chosen for thematic purposes, establishing character, motivation, and perspective, rather than merely driving plot.<sup>26</sup> Meyer’s example demonstrates how a narrative sensibility can elevate lawyering above mere storytelling. In the face of hours of incriminating audio recordings, defense counsel created “an imaginative world”<sup>27</sup> in which acquittal was at least plausible, a feat that Meyer describes as surprising,<sup>28</sup> notwithstanding the ultimate verdict of guilt.

As Amsterdam and Hertz apply the term, “microstructure” refers to aspects of lawyer performance that work at a level often too fine to be detected while they are happening. For example, they chart “the frequency with which the lawyers use the various parts of speech” and how it “reveals—and at the same time shapes—the stories they choose to tell.”<sup>29</sup> They connect these matters of grammar to the highest-level aspects of jurors’ thinking: “The prosecutor’s verbs to describe the jury’s function stress *judgment*, defense counsel’s stress *action* and the Heroic Quest.”<sup>30</sup> Writing with Amsterdam, Hertz, and others about the trial of the officers who injured and arrested Rodney King, Todd Edelman focuses on microstructural elements to demon-

---

<sup>24</sup> Philip Meyer, “*Desperate for Love*” III: *Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1999) [hereinafter Meyer, *Desperate III*]; Philip Meyer, “*Desperate for Love II*”: *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996) [hereinafter Meyer, *Desperate II*]; Philip Meyer, “*Desperate for Love*”: *Cinematic Influences upon a Defendant’s Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994) [hereinafter Meyer, *Desperate I*].

<sup>25</sup> Meyer, *Desperate I*, *supra* note 24, at 734; *see also id.* at 722 (“[T]he argument presented a three-part narrative structure akin to the three act classical drama structure as reconfigured in commercial film.”).

<sup>26</sup> *Id.* at 728 (“He established a sympathetic character and point of view—[the defendant’s]—and implicated the dramatic situation: the bumbling everyman, a low-level Mafioso struggling to make a living, trapped by the orders and commands coming down from the Connecticut capo.”).

<sup>27</sup> Meyer, *Desperate II*, *supra* note 24, at 959.

<sup>28</sup> Meyer, *Desperate I*, *supra* note 24, at 725 (“Before the closing argument, I did not know how [defense counsel Jeremiah Donovan] could respond to the evidence against [his client].”).

<sup>29</sup> Amsterdam, *supra* note 21, at 74.

<sup>30</sup> *Id.* at 97 (emphasis in original); *see also id.* at 95 (“Defense counsel tends to use metaphors that depict the jury’s thinking processes as physical and active.”).

strate the effectiveness of a particularly powerful cross-examination. Defense counsel had the witness, another officer present at the incident, guide the jury through a viewing of the well-known video recording of the event. "Prefacing any questioning . . . about a particular segment of the tape not only with an announcement of the counter number on each frame . . . but with a description of the position of all of the figures on the screen,"<sup>31</sup> the lawyer implicitly challenged the prosecution's central argument that the tape could speak for itself (and that all of America knew what the tape said). Conducted "from a multitude of angles, physical and interpretive,"<sup>32</sup> the cross-examination enacted the defense theme that there was more than one way to look at the tape and that the jurors were bound by their oath to consider them all.<sup>33</sup>

This admittedly compressed framework of the narrative lawyering literature has been drawn from cases involving some central undisputed fact or seemingly dispositive body of evidence. In the homicide trial, defense counsel did not deny that his client had fired the weapon that killed the victim. In the other two cases, the prosecution presented recordings of the defendants' allegedly criminal acts. This aspect of the trials might be assumed to narrow the field in which the lawyers can operate, much as the presence of a judge in the fact-finding role is commonly thought to constrain lawyers' advocacy in bench trials. The literature shows how narrative, when thoughtfully and robustly employed, expands possibilities while remaining anchored in the reality of the evidence. The later Parts of this Article will likewise demonstrate how the core principles of narrative theory, when adapted to the distinctive features of bench trials, uncover deep veins of creative advocacy for lawyers capable of tapping them. Before those possibilities are described, this Part will continue with capsule sketches of the cases from which they will be constructed.

### B. *An Introduction to the Cases*

This Sub-Part summarizes the three trials under examination in this Article, setting the stage for the focused discussion of narrative bench trial lawyering to follow. All three trials took place in Seattle in the summer of 2008. In the most prominent, the city of Seattle sued

---

<sup>31</sup> Alper, *supra* note 4, at 135. Edelman also points out that defense counsel highlighted the logistical challenges of operating the video equipment, perhaps to further establish the idea in the jury's mind that nothing was easy about the videotape. *Id.* at 134 ("Stone emphasized the complexities involved in viewing this evidence by repeatedly declaring himself incompetent to work the equipment properly.").

<sup>32</sup> *Id.* at 135.

<sup>33</sup> See discussion of how defense counsel used voir dire to prepare the jury for this approach *infra* note 217 and accompanying text.



the new, Oklahoma-based owners of the local NBA team, the Super-sonics, to enforce a lease provision requiring the team to play all its home games in Key Arena and thus prevent the team from moving to Oklahoma City. The trial took place in United States District Court and pitted one of the largest and most prominent national law firms against a highly-regarded, though much smaller, local litigation firm. The trial lasted six days (stretched over three weeks), drew overflow crowds, and was the subject of extensive local and some national media attention before ending in a settlement late on the day the judge was to rule. The other two cases took place in nearby King County Juvenile Court. One involved a teenager who allegedly tore down her bedroom closet door in the midst of an emotional outburst, the other a thwarted attempt to steal a bottle of wine from a supermarket. The slammed-door trial took but a few hours; the trial in the supermarket case stretched over parts of three days. All of the lawyers in both of these cases were fairly inexperienced. As is common in juvenile court criminal litigation, the judge in each case ruled instantly upon the completion of closing arguments.<sup>34</sup> Unsurprisingly, there was no media coverage of either case. As will be described within, the differences among these cases, although significant for some of the foregoing analysis, often recede to reveal deep structural similarities that generate a broadly applicable understanding of bench trial lawyering.

### *1. Not Whodunit, but "What Did He Do?"*

The respondent in the bungled theft case was charged in juvenile court with Assault in the Second Degree.<sup>35</sup> The state alleged that he had gone to a Safeway supermarket with another youth and waited in the parking lot while the other youth entered the store and walked out with a bottle of wine for which he had not paid. When a security guard attempted to apprehend the thief, the respondent allegedly struck the security guard in the back of the head, enabling the other youth to escape and causing injuries that required examination at a hospital later that evening. The prosecutor had been admitted to the bar approximately three months before this trial, and defense counsel, a solo practitioner with an emphasis on criminal practice, had been practicing for slightly more than two years. The judge had been on the bench for fifteen years.

The proceedings began with a pretrial hearing at which the judge

---

<sup>34</sup> For a discussion of the problematic nature of this feature of bench trials, see Guggenheim, *supra* note 8, at 581. See also Guthrie, *Blinking*, *supra* note 9, at 43 ("Like cogent medical judgments, cogent legal judgments call for deliberation. Justice depends on it.")

<sup>35</sup> WASH. REV. CODE. § 9A.36.021 (2008).

ruled that a written statement the respondent made to the police was admissible.<sup>36</sup> Immediately after reading the statement, the judge recessed the trial and called counsel into chambers. The in-chambers discussion was not on the record, but from remarks audible in the courtroom and comments made later in the trial, it was apparent that the judge had: (1) directed counsel to read a case that he believed established at least a minimal level of criminal liability for the respondent; and (2) encouraged counsel to pursue a settlement in light of that precedent. The parties did not reach any agreement, and the trial continued.

Neither of the state's witnesses to the incident (a store manager and the victim) was able to identify the respondent in court or to describe in even minimal detail what anyone but the would-be thief had done to further the crime. Despite these proof problems for the state, it was clear that a second individual had participated in the crime, and the respondent's statement, taken under extremely non-coercive circumstances, implicated him. Accordingly, the judge prefaced the closing arguments by saying, "The question is, based on the testimony, he's guilty of something. What is it? That's what I want to hear your argument" [sic].<sup>37</sup> The judge rejected the state's claim that the victim's injuries—a brief concussion and a strained neck—constituted the "substantial bodily injury" required for Assault in the Second Degree and instead found the respondent guilty of Assault in the Third Degree.

## 2. *A Domestic Disturbance*<sup>38</sup>

In the other juvenile court case to be discussed in this Article, a teenage girl was charged with two counts: Malicious Mischief in the Third Degree (Domestic Violence) and Assault in the Fourth Degree (Domestic Violence).<sup>39</sup> Both charges arose from a single incident that

---

<sup>36</sup> Descriptions of this trial are based on the author's observations of portions of the trial, review of pertinent filings, and review of the official audio recording. A copy of the audio recording is on file with the author.

<sup>37</sup> Audio tape: Transcript of Record at Disk 4, 32:12, *State of Washington v. K.K.* (19xx) (No. 09-9-xxxx-01) (copy of recording on file with author) [hereinafter *Safeway Theft*]. Juvenile offender proceedings in Washington are open to the public, WASH. REV. CODE § 13.40.140(6) (2008), and case information and offenders' records are available on the Internet. A youth may, however, have her record sealed after the passage of a designated period of time. WASH. REV. CODE § 13.50.050(11) (2008). In order to prevent the unfortunate result that this Article could preserve information that is one day removed from public records, the author has chosen not to include a case number or the Respondent's name.

<sup>38</sup> All references to what happened in this trial are drawn from the author's review of the official audio recording of the trial. A copy of the audio recording is on file with the author.

<sup>39</sup> See WASH. REV. CODE §§ 9A.48.090, 9A.36.041 (2008).

had occurred in the youth's home. The respondent in this case, whom I will call Michelle,<sup>40</sup> was a fifteen-year-old girl. The complaining witness in the case was Michelle's mother, Deborah. The state's other witnesses were Michelle's older brother, David (himself also a teenager), and one of the responding police officers. A third-year law student represented the state at this trial.<sup>41</sup> Michelle was represented by an attorney from a non-profit public defense firm.<sup>42</sup> This attorney had been a member of the bar for slightly more than two years at the time the trial began. She had started working in juvenile court fairly recently, after several months representing clients in misdemeanor domestic violence cases in criminal court, cases in which her clients had the right to a jury trial. The judge had served more than ten years on the bench, preceded by work for a public defense firm and also in the office of the state Attorney General.

Michelle's mother and brother both testified that in an emotional outburst, Michelle slammed a closet door in her bedroom so hard that it fell off its hinges and on top of her. The mother testified that she entered the bedroom and found Michelle lying underneath the door. At first glance, she thought Michelle was in danger of injury, but she could not help her because Michelle was kicking wildly from beneath the door. In an effort to quiet the kicking, the mother picked up a hanger and "poked" at her daughter's feet. Once out from under the door, Michelle aggressively snatched the hanger from her mother and slashed at her with it, causing an injury the mother discovered only later, after retreating to the bathroom.

The substance of the mother's testimony was dubiously melodramatic at several points, and defense counsel's cross-examination showed her to be inconsistent—with her own prior statements and with her son's later testimony. However, the desperate power of her

---

<sup>40</sup> Audio tape: Transcript of Record, *State of Washington v. X.X.* (19xx) (No. 09-9-xxxx-01) (copy of recording on file with author) [hereinafter *Domestic Disturbance*]. In the interest of protecting the Respondent in this case from having her juvenile court history disclosed, *see infra* note 37, the author will refer to her and her family members with fictional names.

<sup>41</sup> Washington Admission to Practice Rule 9 authorizes students who have obtained two-thirds of the credits necessary to graduate from law school to engage in the limited practice of law under supervision. WASH. ADMISSION TO PRACTICE R. 9 (2009). "Rule 9" interns working for the state are permitted to litigate juvenile court misdemeanor trials such as this one without in-court supervision provided they have previously been supervised in court for at least one trial.

<sup>42</sup> King County contracts with four non-profit firms to provide indigent defense services. The firms with Juvenile Court contracts each have units of attorneys specifically assigned there. Except for the supervisor, attorneys typically rotate through such assignments for anywhere from six to eighteen months. Many of these attorneys are relatively junior, but it is not unusual for attorneys with considerable experience to return to the Juvenile Unit later in their careers.

911 call, which the prosecution played during her testimony, was undeniable. Moreover, her demeanor on the stand showed no lingering resentment or hostility toward her daughter. In fact, she expressed concern for Michelle and evinced humility about the limits of her own memory. In sum, the mother was a complicated figure who presented a puzzle for both lawyers. Quite low-key in manner, the son, David, was a more compelling witness than his mother. As noted above and described in more detail within, there were non-trivial inconsistencies between his testimony and that of his mother. In the end, however, the court found them inconsequential. Rejecting the defense attempts to (a) raise a reasonable doubt based on the inconsistencies and (b) paint the mother as the aggressor in the incident and claim self-defense,<sup>43</sup> the judge found the respondent guilty of both counts.

### 3. *A Losing Battle*

In 2006, Seattle's men's professional basketball team, the Super-sonics, was losing games and money in large quantities, while fans and public officials were losing interest in the team. Attendance was dwindling, and the team's efforts to obtain public funds to construct a new arena had failed. Principal-owner and local businessman Howard Schultz sold the team to a group from Oklahoma City. As Schultz had before them, the new owners failed to obtain public financing for a new arena in or around Seattle.<sup>44</sup> In September 2007, the owners filed for arbitration, seeking to be released from a contractual obligation to play all home games in Seattle's Key Arena. This relief would free the team to begin playing in Oklahoma City. The following week, the Seattle City Attorney filed suit in state court, seeking an order of specific performance of the home game provision of the lease. The team removed the case to federal court, and it was scheduled for trial in June 2008 before United States District Judge Marsha Pechman. The City was represented at trial by the K&L Gates law firm, and the Oklahoma-based ownership group (its corporate name, Professional Basketball Club LLC, was shortened in most accounts to "PBC") was represented by Byrnes & Keller, a small Seattle-based firm.

At trial,<sup>45</sup> the City presented a lineup of public officials, starting

---

<sup>43</sup> The respondent also testified, albeit in highly cursory fashion, responding affirmatively to sharply leading questions by counsel intended to establish that she was in fear of her mother throughout the episode. *Domestic Disturbance*, *supra* note 40, Disk 2, 33:50.

<sup>44</sup> State officials refused to approve such funding, and Seattle voters approved an initiative making it extremely difficult to use city funds for arena construction. Seattle Times Staff, *Seattle and the Sonics*, THE SEATTLE TIMES, Nov. 2, 2007, available at [http://seattletimes.nwsources.com/html/localnews/2003990399\\_websonicstimeline03.html](http://seattletimes.nwsources.com/html/localnews/2003990399_websonicstimeline03.html).

<sup>45</sup> The trial record for most of the proceedings was made available on various media websites including that of *The Seattle Times* (<http://seattletimes.nwsources.com>). Copies of

with the Mayor of Seattle and including others responsible for the day-to-day administration of the Seattle Center, the city-owned plaza that is home to the Key Arena, the Space Needle, and other public cultural amenities and landmarks. These officials detailed the history of the public-private partnership that had resulted in the current lease, as well as the place that the arena and the team occupied within the array of cultural activities and entities that constituted the Center's work. The City also presented economists who described the projected adverse economic impact of the team's departure. In one of the trial's more off-beat yet telling moments, the City called author and passionate Sonics fan, Sherman Alexie, who testified about the emotional impact the team's departure would have on him and other fans and what it would mean for the City's identity. Alongside this story of promises made and broken, the City's trial team developed a separate and more biting theme, portraying the new ownership group as having been intent from the outset on moving the team to their hometown.<sup>46</sup>

Unsurprisingly, PBC's litigation team called an expert economist to rebut the City's economist. The Mayor's testimony for the City was offset by that of a member of the City Council who expressed skepticism about the financial benefits professional sports franchises provide to local economies.<sup>47</sup> Forced to acknowledge that the lease did provide for specific performance and contained the home game provision, PBC's legal team demonstrated, often through the City's own witnesses, that the lease was no longer capable of meeting the objectives contemplated by either party at the time of its execution. The lease's obsolescence, they argued, meant that the City should receive financial relief but not specific performance. Equally important, the PBC litigation team shifted attention away from their clients' provocative emails about moving the team and onto the questionable tactics

---

all transcripts of other trial-related documents cited in this Article are on file with the author.

<sup>46</sup> In one of many emails disclosed during discovery, Clayton Bennett, the leader of the new ownership group described himself to his partners as "a man possessed" with getting the team to Oklahoma as soon as possible. See Josh Feit, *Basketball Court Day 2: The Bennett E-mails & Tim Ceis on Key Arena*, June 17, 2008, available at [http://slog.thestranger.com/2008/06/basketball\\_court\\_day\\_2\\_the\\_bennett\\_email](http://slog.thestranger.com/2008/06/basketball_court_day_2_the_bennett_email) ("Is there any way to move here [Oklahoma City] for next season or are we doomed to have another lame duck season in Seattle?" Ward wrote. Bennett replied: "I am a man possessed! Will do everything we can. Thanks for hanging with me boys, the game is getting started!" Ward: "That's the spirit!! I am willing to help any way I can to watch ball here [in Oklahoma City] next year." McClendon: "Me too, thanks Clay!"). In his deposition, Aubrey McLendon, one of the other members of the ownership group, acknowledged sending an email to Bennett in which he stated: "The truth is we did buy [the Sonics] with the hope of moving to Oklahoma City." Deposition of Aubrey McClendon at 184, *City of Seattle v. The Professional Basketball Club, LLC* (No. C07-1620 MJP) (on file with author).

<sup>47</sup> Council Member Nick Licata testified on June 20, 2008, and June, 26, 2008.

of a group of local business and civic leaders who had positioned themselves to purchase the team if the court prevented the early move and the Oklahoma-based group decided to sell. This local group, led by a developer named Matt Griffin, included Microsoft executive Steven Ballmer. (During trial, they were referred to as the Griffin or Ballmer group.) At an early meeting, former Sonics player and executive Wally Walker had shown the group members a PowerPoint presentation recommending a “pincer movement” in which litigation would “increase the pain” for PBC such that they would be willing to sell to the Griffin group. As revealed at trial, the title slide referred to this approach as “Poisoning the Well.”<sup>48</sup> The unseemly character of these machinations undermined the City’s claim to be the wronged party and manifestly alienated the judge. Her evident displeasure undoubtedly influenced the lawyers as they engaged in final settlement discussions. Minutes before the judge was to announce her ruling,<sup>49</sup> the parties announced a settlement under which the team would be permitted to play in Oklahoma City beginning in the fall of 2008, under a different name, after paying specified sums to the City.

### C. *The Narrative Capacity of These Cases*

Individually and together, these cases are worthwhile objects of study for developing a broadly applicable appreciation of the narrative dynamics of bench trial lawyering. Juvenile court cases are especially good vehicles for exploring the narrative potential of bench trials, because juvenile court dockets contain many cases with fact patterns similar to those seen in criminal court. Generally speaking, the same substantive and procedural rules apply, except for the right to a jury.<sup>50</sup> The Shoplifting/Assault trial involves a common form of youthful criminality, but the age of the accused is fairly insignificant for legal purposes. Thus, this case offers a helpful, if elementary, example of the narrative implications of substituting a judge for the jury as finder of fact.

Intra-family assault cases such as Michelle’s have become more

---

<sup>48</sup> A copy of the presentation is on file with the author.

<sup>49</sup> The trial began on June 15, 2008, and the attorneys delivered closing arguments on June 26, 2008. At the end of the closings, the judge announced that she would rule on July 2 at 4:00. The settlement was announced shortly after 4:00 on the 2nd.

<sup>50</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (asserting that juveniles have no constitutional right to a jury trial). Some states provide for juries by statute. See, e.g., MASS. GEN. LAWS ch. 119, § 55A (2009); see also *In re L.M.*, 186 P.3d 164 (Kan. 2008) (asserting that changes to juvenile code making juvenile justice system more punitive and less rehabilitative require recognition of constitutional right to jury); cf. *State v. Chavez*, 180 P.3d 1250 (Wash. 2008) (holding that there’s no constitutional right to jury despite similar legislative changes).

common in juvenile courts in recent years. Because the youth's age, dependent status, and relationship with the parent/alleged-victim are central to such cases, one might expect such cases to develop differently from the criminal court domestic violence cases with which they have superficial similarities. Integrating the modern criminal justice approach to domestic violence within the traditional juvenile justice paradigm—in which the court, the legal fact-finder, also acts as a substitute parent<sup>51</sup>—is not simple. The trial discussed in this Article illustrates how role-derived preconceptions hinder both judges and lawyers in crafting a narrative response that can encompass this complexity.

Whereas the juvenile court cases are good subjects for this inquiry because of their substantive overlap with criminal cases, the Sonics trial provides valuable contrast across many dimensions. Most obviously, working with an example of commercial litigation makes it possible to test the reach and power of bench-trial narrative theory outside the criminal context. In addition, the prominence of the Sonics trial enriches the inquiry. Most trial lawyers spend their entire careers without trying a case amid the sort of tumult and scrutiny that surrounded the Sonics trial. Any framework for describing trials must be able to survive, and also survive without, the media spotlight and its potentially energizing and distorting influence. Finally, including the Sonics case alongside the juvenile cases offers an opportunity to examine the effect of lawyer experience and status on narrative choice and development. Juvenile court is often a training ground for lawyers. Federal litigation is seen by many as a professional pinnacle. The lawyers in the Sonics trial were considerably more experienced than those in the juvenile court cases. In some instances, this factor can be seen influencing choices the lawyers made and the judges' responses to them. Strikingly, in other instances, the patterns of narrative possibility and peril look very much alike.

Finally, the three cases under review present a continuum with respect to judicial intervention.<sup>52</sup> The judge in the shoplifting/assault case dominated the trial, leaving little room for the lawyers to make their mark. As frustrating as this may have been for the lawyers, the outsize nature of this judicial performance provides a valuable opportunity to observe the judicial mind during trial. The other juvenile court judge appeared to approach the domestic assault case from a great distance, making it difficult for the lawyers to reach him. Even

---

<sup>51</sup> See *In re Gault*, 387 U.S. 1, 16-17 (1967).

<sup>52</sup> For support of the notion that this variability is general and not a random attribute of this set of cases, see Doran, *supra* note 12, at 40 (identifying "considerable variation in judicial style" among judges in Northern Ireland security case bench trials).

so, the lawyers had ample material from which to draw complex narratives. The judge in the Sonics trial fell comfortably in the center, pushing, testing, but also following the lawyers.<sup>53</sup> The lawyers had creative space in which to develop the multi-layered narratives previewed above, addressing the specifics of the lease, the behavior of the parties, the significance of the conflict, and the court's proper role in it. Taken together, the three cases showcase the challenge of managing the near-constant buzz of signals flowing between lawyers and judges as a bench trial unfolds.

## II. SETTING THE STAGE: HOW LAWYERS ENACT NARRATIVE IN OPENING STATEMENT

The importance of opening statements is well-settled within both the trial literature<sup>54</sup> and the culture of trial lawyers. Opening statement also stands as the lawyer's moment of maximum command over the trial narrative. Professor Robert Burns captures this well when he observes that "[b]y the time closing argument begins, each lawyer cannot but be aware that the enabling simplicities of opening have largely disappeared."<sup>55</sup> At the moment of opening, the trial is a field full of promise. No witnesses have failed to testify as expected. The judge has not unexpectedly foreclosed any lines of examination or argument upon which the lawyer's case depends. The lawyer is free to lay out her vision of the case and try to draw her audience into it. If simple, in Burns' sense, when compared to closing, bench trial openings are challenging when compared to their jury trial analogs. Jurors are generally trial novices, eagerly awaiting the entertaining lawyer storytelling characteristic of an effective opening. In contrast, judges are likely see the lawyers' openings, however diverting, as the only thing standing between them and the evidence upon which their decisions should rest.<sup>56</sup> Judges are unlikely to interrupt an opening statement, but may quickly dismiss lawyers they believe to be off-track. Moreo-

---

<sup>53</sup> See *id.* at 43 (calling upon judges in bench trials to exercise "relative passivity" as an intermediate approach to intervention that signals to lawyers without supplanting them).

<sup>54</sup> See STEVEN LUBET, *MODERN TRIAL ADVOCACY: LAW SCHOOL EDITION* 341 (2d ed. 2004) ("This moment is crucial since the mental image that the jurors hold while hearing the evidence will directly influence the way they interpret it."); THOMAS A. MAUET, *TRIAL TECHNIQUES* 61 (5th ed. 2000).

<sup>55</sup> BURNS, *supra* note 8, at 67.

<sup>56</sup> See Robert E. Cartwright, Jr., "*Bench Trial Acumen*"—*To Bench or Not To Bench—That Is The Question*, in WINTER 2004 ATLA-CLE 93 (2004). Cartwright believes that lawyers need to "[d]eliver a concise, logical and organized presentation [as][t]he Court is likely to be less tolerant of a rambling, storytelling approach to opening statement that some lawyers utilize." *Id.* Even so, he asserts, they should not shrink from advocacy. "You still need to keep the Court's attention, entertain, and be a passionate and zealous advocate." *Id.*



ver, as seasoned lawyers, judges have been trained and conditioned to identify, almost immediately and instinctively, the moment when an advocate veers off-track, at least as they have plotted that track.

The scope and duration of the openings in the domestic assault case and the Sonics trial differed in predictable ways given the differences in the volume of evidence, the experience of the lawyers, and the stature of the forum. The relatively new lawyers in the one-day juvenile court trial delivered openings that were quite brief, but, as will be shown, not unduly so. Each lawyer told a complete and coherent story. The experienced lawyers in the longer and more complex federal trial gave commensurately longer and more comprehensive openings. The lawyers in the Safeway trial waived opening entirely, a decision described in more detail in Part V. Analysis of the narrative structure of the openings in the two trials which featured them and the decision to waive in the third case reveals a common dynamic: opening statement (or the lack thereof) established the terms of the relationship between lawyer and judge that would inform each trial's unfolding narratives. The lines laid down at the outset of the case reappeared throughout the trial, informing the content and also the tenor of the ultimate decision. In this way, the cases reflect the core principle from the narrative literature that the manner in which the stories are told can be even more significant than their content.

#### A. *The Power of Patterns*

The domestic assault trial provides an especially vivid illustration of the importance of recognizing how a particular case fits within the patterns etched into the judge's mind by prior trials. Each opening in this trial fit squarely within such patterns, amplifying the effects of the lawyers' words and images, in ways intended and accidental, beneficial and counter-productive. In an opening that lasted only fifty-two seconds,<sup>57</sup> the prosecutor presented the main characters, told her story, and primed the judge to act. She offered a simple plot: "The respondent slammed her closet door, breaking it off its hinges," and then slashed her mother with a hanger. "Devastated," the mother/victim "was still sobbing and crying"<sup>58</sup> when the police arrived. Without saying much and without the need to say more, the prosecutor unveiled a very powerful script, pulsing with the tension between a common state of affairs (a slammed door in a teenager's bedroom)

---

<sup>57</sup> This is not intended as criticism. The student-prosecutor handled herself professionally throughout the trial, an accomplishment in itself. Fairly prosaic, this opening was quite similar to those the author has seen from juvenile court prosecutors with considerably more experience.

<sup>58</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 9:46-10:12.

and the unusual denouement (the arrival of the police). The fact that a mother called the police for protection from her own child sent the unmistakable message that this was no ordinary tantrum.

Within the fifty-two seconds of her opening statement, the prosecutor recited the name of each offense twice, once at the beginning and once at the end. She thus uttered the phrase "domestic violence" four times in less than one minute.<sup>59</sup> Doing so, she activated a powerful set of associations peculiar to this class of crimes (e.g., a history of subordination, a cycle of power and control, an inability to escape).<sup>60</sup> Although this juvenile court trial did not contain evidence of any of these features of domestic violence,<sup>61</sup> the prosecution stood to benefit from the now well-established recognition that, for a long time, courts and the rest of the justice system were too slow and timid in responding to domestic violence.<sup>62</sup> The prosecutor's repetition of the term "domestic violence" implicitly raised the stakes for the judge. He could protect the victim or ignore (and perhaps increase) the risk to her, a risk made to seem graver because the prosecutor's opening offered no context or precipitating event for the assault, suggesting that raging adolescence defies explanation in court much as it does discipline at home.<sup>63</sup>

More polished and powerful in delivery, defense counsel took a strikingly similar substantive approach in opening. After suggesting

---

<sup>59</sup> WASH. REV. CODE § 10.99.020 (2008) defines domestic violence to include specified crimes between "family and household members," a class defined to include "persons who have a biological or legal parent-child relationship."

<sup>60</sup> The Domestic Abuse Intervention Project of Duluth, Minnesota is often cited with developing the image of the Power and Control Wheel visually depicting the various forms of abuse and domination thought to characterize many relationships marked by domestic violence. See Domestic Abuse Intervention Programs, <http://www.theduluthmodel.org/wheelgallery.php> (last visited Sept. 18, 2009).

<sup>61</sup> As the arrest rates for teenagers have declined over the past decade-and-a-half, parent-on-child assaults have come to occupy a substantial portion of the cases remaining on the dockets of many juvenile courts. See HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006) ("[T]he rate of juvenile violent crime arrests has consistently decreased since 1994, falling to a level not seen since at least the 1970s."). Conversations with juvenile defenders nationwide have confirmed the author's experience and observations regarding both the increasing frequency of such prosecutions and their striking dissimilarity with incidents of domestic violence assault between adults. In light of the societal interest in preserving ties between youth and their families, even in most high-conflict parent-child relationships, the domestic violence framework, created as a means of ending relationships between adults, may be an unhelpful way of approaching these cases.

<sup>62</sup> See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992).

<sup>63</sup> In the even graver context of death penalty litigation, James Doyle has described how "sometimes the absence of comprehensible motive . . . is the prosecutor's most effective tool." James Doyle, *The Lawyer's Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 424-25 (1996).

that there would be little factual conflict between the parties,<sup>64</sup> counsel sought to persuade the court that the mother had been the principal aggressor. As defense counsel framed the events, this simple incident of domestic turmoil escalated only because the mother resorted to violence, swinging a hanger at her daughter as she lay trapped beneath the door and ordering her son, who was considerably bigger than his sister, to subdue her with a "wrestling move." Beneath the door and under attack, outnumbered and outsized, the girl had no choice but to defend herself, and any injury she may have caused was excusable. Just as the state offered no explanation for the daughter's anger, the defense provided no explanation for the mother's extreme aggression.

This similarity in tone and texture between the two openings nearly suffocated the defense narrative. Engaging, as the state had, in context-free finger-pointing, the defense forced the judge to choose between the parent and the child as to who initiated the violence and who would be telling the truth at trial. Even if the respondent had been prepared to testify in more detail than she did, her chances would not have been very good. Whether it is their distance from adolescence, their repeated exposure to alleged youthful misconduct, or other factors, judges seldom find youth credible when compared to adults. More significantly, the narrative structure of the defense opening unwittingly but unmistakably reinforced the state's invocation of the domestic violence paradigm. Adults charged in criminal courts with domestic violence offenses frequently defend themselves by raising the claim of self-defense and painting the alleged victim as the aggressor.<sup>65</sup> Such claims, often made for want of any plausible alternative,<sup>66</sup> likely have greater persuasive potential before a jury,

---

<sup>64</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 11:11-33 ("Your honor, . . . what the state has said, I actually agree with absolutely everything that she has mentioned. I do think that the door did fall. The door actually fell on top of [Michelle]. And in the process, while she had this door on top of her, Mom comes in and grabs the hanger and starts hitting her on the legs while she has a door on top of her.").

<sup>65</sup> See, e.g., *State v. Hendricks*, 787 A.2d 1270, 1272-73 (Vt. 2001) ("Ms. Lee claimed that defendant grabbed her by the throat and banged her head against the wall. . . . Defendant, however, stated that Ms. Lee had kicked him in the groin, bit his finger and hit him in the head, and that he had merely pushed her away in self-defense.").

<sup>66</sup> Provided there is sufficient proof of injury (rendering a claim of fabrication unavailable) and the defendant's involvement (dispatching any identification claim), there may be little else the defense can argue in trying to raise a reasonable doubt as to guilt. For an example of the half-hearted, almost self-incriminating way in which such claims are often raised, see *State v. Watson*, No. 22207-1-III, 2004 Wash. Ct. App. WL 1730256 (Wash. Ct. App. Aug. 3, 2004). In this case, a wife testifies that "[d]uring the argument, Mr. Watson grabbed her by the throat and slammed the back of her head into a door jamb. Mr. Watson then head-butted her and said, 'There, and now you can tell your mother she can pay for a divorce.'" *Id.* at \*1. Husband testifies that "the contact was accidental and he was

which sees but one such case, than before a judge, who has the opportunity to see a pattern develop. A former public defender, this judge was likely keenly aware of how such a trial theory would be chosen and thus especially skeptical of it.<sup>67</sup>

As is often the case, both attorneys in this trial presented the case as an easy one, with an obvious resolution (each proposing a different outcome, of course). However intuitively attractive, this approach to advocacy will often prove counter-productive. Recent research into judge's cognitive errors (which mirror those of the rest of us) reveals the benefit of making decisions look difficult.<sup>68</sup> When decisions appear to be easy, they will be made quickly, often by automatic thinking and shortcuts. Mere counter-arguments will not upset or forestall a judge's automatic thinking. A lawyer must first recognize which side stands to be on the losing end of the quick decision, a process that requires a degree of pre-trial objectivity often hard to attain.<sup>69</sup> Having recognized this risk, the lawyer must avoid it by re-defining the question before the court in a surprising way. As James Doyle has observed in the context of representation in capital cases, "[t]he real cure for stereotyped thinking is not the substitute of a different stereotype but a new way of looking at the world."<sup>70</sup> Answering an assault charge with a self-defense claim, especially in a domestic violence case, is utterly unsurprising.

Narrative lawyering theory offers guidance for lawyers seeking to confound expectations and induce judges to suspend judgment and break free of their habitual ways of thinking. Professor Amsterdam writes that "narrative restores the mystery of the world."<sup>71</sup> This is not

---

just acting in self-defense." *Id.* at \*2.

<sup>67</sup> See Leipold, *supra* note 2, at 162 (claiming that lawyers cite the concern that "judges were more likely to 'know what we are up to'" as one of the common reasons for rarely opting for bench trials). The juvenile court judge in the instant case dismissed the suggestion that the mother was the aggressor by pointing out that she was wrapped in a bath towel during the incident and thus not "dressed for a fight." Domestic Disturbance, *supra*, note 40, at Disk 2, 55:15-26. That the judge disposed of the self-defense claim so simply is an indication of how little he made of it.

<sup>68</sup> Guthrie, *Blinking*, *supra* note 9, at 15; see also BURNS, *supra* note 8, at 182 (warning that "a legal system where decisions flow easily from the 'sort' of situation it is, because of relatively generalized and abstract features of situations, is a system where there will be relatively little internal strife and correspondingly little justice").

<sup>69</sup> See Alper, *supra* note 4, at 10 (proposing narrative as an alternative to an approach in which lawyers seek merely "to confirm the most immediately obvious favorable scenario").

<sup>70</sup> Doyle, *supra* note 63, at 438.

<sup>71</sup> Alper, *supra* note 4, at 10. For a different perspective on the challenge of developing litigation approaches that can accommodate the mystery and complexity which emerge from client narratives, see John Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer To Do When His Two Favorite Theories Collide?*, 6 CLIN. L. REV. 85 (1999). In the cases Mitchell discusses, the lawyers struggled to find a way to make the

mystery in the procedural sense of a whodunit, where one sets out on a path confident that the answer lies at the end. Instead, it is mystery in the sense of complexity, a recognition that individuals act within a web of relationships and that their actions and motivations, are not easily reduced to a formula. Defense counsel in the domestic assault trial had the opportunity to invite the court to see the case as complex, laced with mystery, and requiring cautious deliberation before judgment. Counsel might have opened the trial by saying, "Being a teenager is tough. One minute you're supposed to act independently, like an adult, and the next minute, someone's saying, 'No, you're not ready for that yet.' It's confusing, it's overwhelming, it's a mess. One of the few things that may be harder than being a teen is being the parent of a teen. Leave the kid alone and they wind up in trouble. Get too close and you're smothering them. It's a wonder most families make it through the storm, but they do. The family you will meet today has weathered some of the storms of adolescence. This particular storm hit them hard and tossed them around. It began when Michele slammed her bedroom door too hard, it picked up steam when her mother grabbed a hanger and swung it at her, and it ended some time later that evening, with the police on the scene, the daughter depressed, and the mother bleeding from her elbow and sobbing. Neither mother nor daughter made their best decisions during this incident, but neither one committed a crime."

Instead of pitting the mother and daughter against each other as both lawyers did, this approach recognizes their common goal, the daughter's progression to adulthood. This approach offers the possibility of unraveling the state's "domestic violence" paradigm. The family-in-a-storm metaphor brings to the surface the fact that society wants this mother and daughter to preserve and improve their relationship, whereas with adults involved in domestic violence, society likely prefers that the relationship end.<sup>72</sup> The suggested opening creates equivalences between the daughter and mother: each commits an act which escalates the tension, each ends up in an unhappy state. The judge does not need to jump in between them. Instead, he needs to

---

clients' narratives comprehensible to jurors from a culture different from the clients'. *Id.* at 116. In other words, the challenge was the opposite of the one described here, where lawyers seek to induce judges to look past what they think of as familiar and see the particularity.

<sup>72</sup> See Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 ST. THOMAS L. REV. 483, 497 (2005) ("Creativity in legal problem solving, and the emotional intelligence that is an indispensable part of it, are enhanced by processes like metaphor."); Eastman, *supra* note 13, at 815 ("If the metaphor is new and fits, it can change the reality before the judge.").

stand beside them. This is a far superior vantage point for appreciating them as individuals and understanding the complexity of their relationship. Of course, identifying this narrative goal presents the lawyer with the more challenging task of creating a rhetorical bridge between the life and world of the judge and those of this troubled teen.<sup>73</sup>

By beginning the opening with the daughter's peace-breaking act of slamming the door, defense counsel would signal to the judge that she is prepared to acknowledge her client's faults and present a three-dimensional picture of the family, as opposed to the caricatures of raging teen and demonic parent which were presented in the actual trial.<sup>74</sup> This subtle move has the potential to drastically alter the trial's alignment, shifting the way the judge is positioned vis-à-vis the respondent and counsel. Fulfilling her role as her client's champion, but in an unconventional way, counsel would be inviting the judge to join her in the task of appreciating the mystery within the life of this family while also suggesting that their experience is not so bizarre or atypical as to be beyond comprehension by those willing to look closely.<sup>75</sup> Instead, as will be revealed more fully in Part III, defense counsel became enmeshed in a civil, but unrelieved, conflict with the judge as she attempted to attack the mother and wholly exonerate the daughter.

### B. Defining Roles

Unlike the lawyers in the domestic assault case, the lawyers in the Sonics trial used their opening statements to present starkly different characterizations of the dispute and the role the judge should play in resolving it. Paul Lawrence,<sup>76</sup> lead attorney for the City, presented

---

<sup>73</sup> See BENNETT, *supra* note 5, at 171 ("[E]ven the construction of a coherent story may not guarantee a just outcome if the teller and the audience do not share the norms, experiences, and assumptions necessary to draw connections among story elements.").

<sup>74</sup> Meyer makes a similar point in his analysis of a closing argument in Meyer, *Desperate I*, *supra* note 24, at 741 ("The prosecutor's version of Louis Failla, a flat and sinister caricature, was far more a lifeless cartoon than Donovan's literal cartoon representation of Failla.").

<sup>75</sup> See BURNS, *supra* note 8, at 44 ("[A] theory is superior if people act 'normally.'").

<sup>76</sup> Referring to the lawyers in this case by name is not intended to signal any lesser respect for the lawyers in the other cases discussed here, whose names are not used. The Sonics trial received extensive media coverage, and the lawyers themselves have been the subject of considerable public discussion. A year after the trial's conclusion, the Summer 2009 issue of *Washington Law and Politics* ran a cover story, with a photograph of Brad Keller, in which it identified him as the lawyer whose "courtroom performance helped send off the Sonics." Michael Hood, *Somebody's Got To Do It*, Summer 2009 WASH. L. & POL. Cover (2009). Moreover, the actions of Slade Gorton, one of the city's pre-trial lawyers, became a prominent issue in the case. Finally, the contrast between the competing firms in this trial likewise informs the analysis of the case. See *infra* note 110. The deci-

the dispute as so simple that it scarcely needed much of a trial at all. After all, "the lease says what it says."<sup>77</sup> The lease contained one clause requiring the team to play its home games at Key Arena and another entitling the City to specific performance in the event of breach. Reading the two together would lead the judge to the only possible ruling. This case would not require complicated legal research or analysis, the resolution of conflicting memories, or the interpretation of ambiguous events. As counsel set it out, it seemed almost a shame that the judge would need to devote her time and energy to so ministerial a task.

With the first line of his opening, Lawrence signals respect for the court's distance from and ability to see beyond the passions that had dominated public discussion of the case. "This is a case," he begins "about the city of Seattle's policy decision to specifically enforce their lease with the Seattle Supersonics. . . ."<sup>78</sup> Consistent with this framing of the conflict, Lawrence presents the City as a bureaucratic entity. Before the lease was ever signed, "[t]he City of Seattle *made a policy decision* that they would invest in building a new. . . facility."<sup>79</sup> In the trial brief filed with the court, this same decision had been presented thus, "In 1994, the city *determined to pledge* more than 80 million taxpayer dollars" toward the renovation of the arena. In the narrative world that counsel is inviting the court to enter, the City is a plodding bureaucratic beast with the heart of a cautious lawyer. It does not take rash actions (e.g., investing or even deciding to invest); it makes "policy decisions." It does not make commitments or pledges without first determining to do so. This portrayal characteristically presents

---

sions in this Article regarding naming the lawyers are consistent with the general narrative literature. Alper and his co-authors, *see* Alper, *supra* note 4, do use names in their discussion of the high-profile trial of the officers accused of assaulting Rodney King. Meyer likewise refers to the defense lawyer he profiles in his series of articles by name. *See supra* note 24. The case Meyer analyzed involving organized crime figures received some media attention, at least locally. *See, e.g.,* Meyer, *Desperate I*, at 723, n.8. Also the lawyer, Jeremiah Donovan, spoke publicly about the trial in a symposium on narrative theory. Jeremiah Donovan, *Some Off-The-Cuff Remarks About Lawyers As Storytellers*, 18 Vt. L. REV. 751 (1994). In contrast, Amsterdam and Hertz, do not use names in their article analyzing closing arguments in a trial in which the identity of the parties or the lawyers was not significant for their analysis. Amsterdam, *supra* note 21.

<sup>77</sup> Transcript of Record at 6:7-8, *City of Seattle v. Prof'l Basketball Club*, No. C07-01620-MJP, 2008 U.S. Dist. (W.D. Wash. 2008) (No. C07-01620-MJP) [hereinafter *Basketball Transcript*].

<sup>78</sup> *Id.* at 4:15-16.

<sup>79</sup> *Id.* at 5:1-3. (Throughout this Article, the author has used italicized font to indicate emphasis that he either heard in the spoken voice on the cited audiotape or in live proceedings, [in the Safeway Theft and Domestic Disturbance matters] or that he adds presently for his own emphasis when quoting from available transcripts, in the Basketball matter. Thus, all emphases in quoted trial text are the author's, and are designated as such with "emphasis added.").

the crucial moment, the creation of the lease, in equally cool, lawyerly terms: “[t]o effectuate this decision and the investment of taxpayer dollars and taxpayer credit, the City entered into a lease.”<sup>80</sup> “Effectuate” is not a word for a jury opening,<sup>81</sup> and it does not offer much for most bench trials. In sound and sense, however, it belongs in this opening. Counsel’s methodical, anti-dramatic introduction presents the trial as the culmination of a process set in place long ago, by the lawyers who drafted the lease. All that remains is for the judge, the lawyer-in-charge, to bring the case to its preordained completion. Like the judge, the trial lawyers themselves have little to do. Better they should stay out of the way and keep the litigation from devolving into a distracting sideshow.

This characterization ultimately shackles counsel, creating the image of an enervated, rather than deserving, client. Referring to the City’s interactions with the new ownership group, Lawrence states, “[t]he City . . . has made clear from day one . . . that the City *intended to make a policy decision to enforce the lease*. . .”<sup>82</sup> Perhaps if in front of a jury, counsel would have said, “The City would fight to keep its team.” Saying “the City would enforce its rights” would at least have suggested a readiness to fight. Making “a policy decision to enforce the lease” is more indirect. It places the decision-maker behind a desk, far from any contest. “Intending” to make a policy decision to enforce one’s rights, the City appears to be confined to the sterile realm of thought.

This dispassionate approach created an emotional void,<sup>83</sup> as became evident when counsel attempted, toward the end of the opening, to fill it. Shortly before reprising his opening line about the City’s policy decision and then sitting down, Lawrence previewed the testimony of Sherman Alexie, acclaimed author and passionate Sonics fan: “As writer Sherman Alexie will testify, the health and pride of a city depends on more than its politics, it also needs art, and, yes, it needs athletics. A great city needs to work on its soul, mind and body. A great city needs to embrace as much greatness as it possibly can.”<sup>84</sup> This talk of “greatness” in its various forms clashes starkly with the tone, grammar, and vocabulary of the opening to this point. One can

---

<sup>80</sup> *Id.* at 5:16-18.

<sup>81</sup> See LUBET, *supra* note 54, at 377 (“[S]imple language is generally the best. . . . Your opening statement can be sophisticated without relying upon language that you won’t hear on the evening news.”).

<sup>82</sup> Basketball Transcript, *supra* note 77, at 7:4-6.

<sup>83</sup> See BURNS, *supra* note 8, at 36 (describing case theory as a double-helix, one strand dominated by narrative and the other by logic). The city’s logic-heavy approach left its narrative strand under-developed.

<sup>84</sup> Basketball Transcript, *supra* note 77, at 15:23-25, 16:1-2.



imagine an opening in which the City was presented from the outset as a vibrant community of diverse individuals with an array of talents and interests, with sports arenas as among the vital communal gathering points. That is not the course Lawrence chose, and, as Alexie himself noted in post-trial commentary, there was no room for him in Lawrence's city of policy<sup>85</sup> nor for his testimony in the structure of the trial Lawrence erected early in the opening.<sup>86</sup>

Remaining in the more animated mode he shifted to late in the opening, Lawrence vigorously and pre-emptively defended the "civic leaders" working to keep the team in Seattle: "*There is nothing wrongful about what they did. There is nothing wrongful about trying to keep a team in Seattle. There is nothing wrongful about the City enforcing the lease rights it has bargained for.*"<sup>87</sup> The three-part refrain (with repetition joined to slight variation) is an ancient rhetorical technique which has become a standard part of the trial lawyer's repertoire.<sup>88</sup> In this instance, however, the move may have inadvertently undermined counsel's case. Like the reference to Alexie's testimony, this passage creates dissonance with the core of counsel's opening. Throughout the opening, counsel has sought to focus on the transaction that started the process (i.e., the creation of the lease) and not the litigation that is ending it. In tone and substance, counsel had made the trial seem a mere formality. But here, toward the end, he adopts the language of a hotly contested trial. Because of her familiarity with courtroom rituals and styles, a judge would be far more likely than a jury to register the significance of this change in tone. The judge likely believed that good lawyers and good businessmen would not waste their time, money, and energy on an utterly unworthy lawsuit, especially one in which they will have to persuade her and not a jury.<sup>89</sup> This late change in tone likely further undermined the cut-and-dried

---

<sup>85</sup> Sherman Alexie, *Sixty-One Things I Learned During the Sonics Trial: A Sonics Love Story*, THE STRANGER, June 29, 2008, <http://www.thestranger.com/seattle/Content?oid=631015&hp> ("The sportswriters who liked my testimony and press conference . . . were happy to note that I introduced emotion into the trial. Isn't it strange that we have to highlight the introduction of emotion into a gathering?").

<sup>86</sup> The judge deemed Alexie's testimony insubstantial. Basketball Transcript, *supra* note 77, at 1113:22-25 ("I don't know that I have ever seen any case law that basically talks about does the city shed tears. . . . In other words, can a corporate entity have sentiment?"); see Cartwright, *supra* note 56, at 93 ("[Judges] are not likely to forgive perceived ploys to elicit sympathy.").

<sup>87</sup> Basketball Transcript, *supra* note 77, at 14:5-8.

<sup>88</sup> Historically referred to as the tricolon, this device has been called the "rule of three" in the modern advocacy literature. See, e.g., Murray Ogborn, *Making Your Case Come to Life: Storytelling and Theme Creation*, 1 ANN. 2001 ATLA-CLE 189 (2001).

<sup>89</sup> Often, the accused in a juvenile or criminal bench trial is not paying for counsel, due to indigence, and stands to gain little by pleading guilty due to the narrow range of possible sentences. Thus, judges might not make the same assumption in such cases.

approach encapsulated in the notion that “the lease says what it says.” Moreover, the lawyerly defensiveness of the City’s claim that those affiliated with it did “nothing wrongful” only reinforced the notion that there was more to the story than counsel had been telling. In this manner, the City’s opening actually set the stage for its opponent, unintentionally priming the judge to want to hear more about the dispute, to see what lay beneath the placid surface counsel had initially set out.

Brad Keller, lead counsel for the owners, also began his opening talking about the lease and sounding like a lawyer (in the pejorative sense): “The evidence is going to show that there were two fundamental premises that underlay this lease back in 1994.”<sup>90</sup> However, as he set out the premises, Keller invited the judge to see the case—and the roles of counsel and the court—very differently than his counterpart had, achieving an immediacy and force that propelled his case throughout. The first premise was that “the City of Seattle wanted a 15-year commitment by the Sonics to play their home games here.”<sup>91</sup> He does not merely endorse his opponent’s principal claim; he announces to the court that he is doing so. “That’s right, your Honor, I just said that back in 1994 the home game provision was an important provision in this lease.”<sup>92</sup> Conceding prominently, Keller sends the message that he is willing to acknowledge his side’s weaknesses and that he will not fight merely for the sake of fighting, nor try to obscure that which is plain.<sup>93</sup> He is facing the situation squarely, exactly as (he need not say) the court will. Keller may not have anticipated that Lawrence would end his opening on the overreaching note that the City’s civic leaders had done “nothing wrongful,” but he certainly benefitted from the contrast as he moved forward to demonstrate that a just resolution to this far-from-simple case would demand that the judge exercise her judgment and not merely her rubber stamp.

Having staked a claim to the trial’s middle ground and the judge’s full attention, Keller unveiled his second premise: that, to be meaningful to either party, the lease had to be economically feasible. This was just as obvious, although unstated, as the clearly-stated home game

---

<sup>90</sup> Basketball Transcript, *supra* note 77, at 16:16-17.

<sup>91</sup> *Id.* at 16:18-19.

<sup>92</sup> *Id.* at 16:20-21.

<sup>93</sup> In an interview with the author, Keller suggested that a lawyer must build a bench trial opening from the weakest point in his/her case because that is the place the judge is likely to engage it most vigorously. Interview with Bradley S. Keller, Partner, Byrnes & Keller, LLP, in Seattle, Wash. (Aug. 15, 2008) (on file with author) [hereinafter Keller Interview]; see also ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 21 (2008) (“Yield indefensible terrain—ostentatiously. . . . Raise [weak points] candidly and explain why they are not dispositive.”).

provision. Keller's language here opens up the narrative that will dominate the rest of his case. "These two underpinnings of this lease, 15 years of home games and having a competitive NBA arena, they *went hand in hand* back in 1994. And they remain *joined at the hip* today."<sup>94</sup> With "hand in hand" and "joined at the hip," Keller has left the lawyer-talk behind. He could be explaining his case to a jury or even a bar full of Sonics fans.<sup>95</sup> As the premises are paired, so are the parties: "You know, everyone always thinks in the beginning the marriage will last, and everyone hopes that it will last."<sup>96</sup> The case is no longer merely a contract dispute between the "First-class charter city" and the "limited liability corporation" of the official caption. Instead, the court confronts the saga of two groups of people who came together to make something special and enduring, in other words, something worth fighting for. The hyper-analytic, narrative of the City's opening has given way to the story of a relationship, albeit between corporate entities, that is at its core about human interests, fraught with human emotions, and ultimately shaped by the actions of human beings.

Having invited the court to see the parties and the conflict in this new light, Keller suggests that the failure of the relationship, like the failure of so many marriages, was "not anyone's fault."<sup>97</sup> Keller then follows through with the marriage metaphor to illustrate the harm that would come from granting the City's request. "In fact, the evidence is going to show that this is a broken relationship that no longer works. And like a broken marriage, the estranged parties shouldn't be forced to continue under the same roof for two more years."<sup>98</sup> Here, Keller suggests that the City is essentially asking the court to join it in denying reality and prolonging the pain.<sup>99</sup> Keller returns to the marriage metaphor explicitly and implicitly throughout the opening.<sup>100</sup>

---

<sup>94</sup> Basketball Transcript, *supra* note 77, at 17:8-11.

<sup>95</sup> The previously referenced photo of Keller on the cover of *Washington Law and Politics* magazine, see *supra* note 76, shows him in a bar, in a traditional lawyer's suit, in a crowd that includes one fan who is wearing a Sonics jersey.

<sup>96</sup> Basketball Transcript, *supra* note 77, at 17:18-19.

<sup>97</sup> *Id.* at 17:23-25, 18:1 ("[L]ike many relationships do, this relationship broke down. It failed as the years went by and it has just gotten worse and worse as time went by. Now, you know there is a tendency when a relationship breaks down for one side to blame the other. And I think you heard a little bit of the blame game this morning in the opening comments of the City's counsel.").

<sup>98</sup> *Id.* at 19:14-17.

<sup>99</sup> For analysis of a similar rhetorical move, see Anthony Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in Brown*, 68 N.Y.U. L. Rev. 226, 235 (1993) (describing how Thurgood Marshall built his oral argument in *Brown v. Board of Education* around the theme of segregation's irrationality, presenting it as "a vice that the Justices themselves must either practice or put aside").

<sup>100</sup> Setting up the parties' joint financial expectations, he states, "You will learn begin-

Revisiting the absence of fault, Keller describes how “[t]he revenue shortfalls you will see have caused a lot of economic hardship, hardship on both the City and the team.”<sup>101</sup> The parties have suffered together, and that suffering is not due to profligate spending by one or the other of them. Instead, the romantic vision underlying their “virtually unprecedented”<sup>102</sup> partnership has been overtaken by events, specifically, the creation of more luxurious and financially productive sports facilities around the NBA and even in Seattle itself, as new football and baseball stadiums were built with more conventional financing arrangements. With this emphasis on the novelty of the Sonics lease, Keller suggests that the City and the team had metaphorically eloped, i.e., taken a bold chance on something others would have warned them against but that they were convinced would work.

Having established the bond that had existed between the City and the team, Keller then turns the spotlight on the hostile and therefore hidden actions of Lawrence’s “civic-minded citizens.” Displaying the title slide from the “Poisoned Well” PowerPoint, Keller shows something “wrongful,” to use Lawrence’s term: Wally Walker talking to would-be local owners “about using this litigation and specific performance as a means of inflicting financial pain as a way to impose, quote, forced bleeding, close quote, to try to coerce a sale.”<sup>103</sup> According to Keller, Walker had laid out a strategy in which “Mr. Gorton and his crew would increase the pain of staying, both financial and to the reputation of the PBC.”<sup>104</sup> Mr. Gorton, it is worth noting, is Slade Gorton, former U.S. Senator and member of the 9/11 Commission. Here, Keller refers to him as if he were a mob boss looking to improve the terms available to his client.<sup>105</sup> This one slide balanced, and perhaps even displaced, the PBC email messages about moving

---

ning in 2000 and 2001 the Sonics didn’t generate the revenue contemplated, and on which the parties based their 15 year vow.” Basketball Transcript, *supra* note 77 at 20:25–21:2 (emphasis added); see Eastman, *supra* note 13, at 815 (saying that a metaphor “leaves ‘unused parts’ . . . unspoken but still available”).

<sup>101</sup> Basketball Transcript, *supra* note 77, at 21:3–5.

<sup>102</sup> *Id.* at 19:24.

<sup>103</sup> *Id.* at 33:3–6.

<sup>104</sup> *Id.* at 33:19–21.

<sup>105</sup> For examples of the cultural resonance of mafia-related symbols and references, see Alper, *supra* note 4, at 15. See also Meyer, *Desperate III*, *supra* note 24; Meyer, *Desperate II*, *supra* note 24; Meyer, *Desperate I*, *supra* note 24. Keller does not use any words that would run the comparison too far over the line and perhaps alienate the judge and bring her to Gorton’s defense. In this way, he achieves the delicate balance the authors in *Stories Told and Untold*, Alper, *supra* note 4, at 186–99, appear to be seeking, perhaps in vain, when they suggest that the prosecution in the King officers’ trial might have benefitted by subtly evoking but not explicitly analogizing to the “ordinary Men” who perpetrated the Nazis’ horrors.

the team that had caused such a stir in the media prior to trial and had also consumed a good deal of the court's time.<sup>106</sup>

Keller ends, as he began, a self-appointed teller of uncomfortable truths. He acknowledges the team's impending move as a loss for the City and its people, but he calls upon the judge to see the situation clearly:

You know, reminiscing about the glory days of yesteryear, when 30 years ago this team won an NBA title . . . that is not what the issue is in this case. If civic pride has anything to do with this case, and we submit it doesn't, the issue is what civic pride will there be over the next two years when this will be a lame duck franchise? What civic pride will there be as the steadily decreasing attendance continues to decline when a few thousand dedicated but loyal fans sit in a seemingly empty arena? What civic pride will there be as an already disappointed fan base, and understandably so, becomes even more embittered during what would be a prolonged lame duck period?"<sup>107</sup>

The judge cannot turn the team into champions, nor the lapsed fans into ecstatic, hero-worshipping youngsters. Likewise, she cannot turn the outmoded lease into a blueprint for economic success. However, the absence of heroic possibilities does not leave the court without a meaningful role to play. Keller ends his opening by urging the Court to achieve what little good the trial makes possible: "This marriage is broken. It has been broken for over five years. The City wants to increase and force the bleeding. We say it is time to stop the bleeding."<sup>108</sup>

Keller began the trial, the climax of an extremely contentious sequence of litigation, by bringing the court back to the moment when the relationship between the two parties, the City and the team, was in its earliest and happiest stages. He did not portray his clients as innocent victims or their adversaries as unreconstructed villains. This opening exemplifies lawyering with an appreciation for complexity, a hallmark of a satisfying narrative. It also demonstrates that such lawyering is not merely feasible in bench trials, it may be most effective in them. Opening statement offers lawyers a brief but invaluable monopoly on the trial's communication channels. They risk squandering

---

<sup>106</sup> This is a variation on, even an inversion of, the work of the lawyers for the Los Angeles officers in deconstructing the videotape. See *supra* text accompanying note 33; *infra* note 229. Keller re-categorizes the Oklahoman's emails as old news, less noteworthy than the revelation of the machinations of the Seattle natives.

<sup>107</sup> Basketball Transcript, *supra* note 77, at 40:13-22. The "civic pride" refrain, *id.*, offers a three-point match for Lawrence's "nothing wrongful" litany, *id.* at 14:5-8, and sends a clear signal to the judge that a true battle is on.

<sup>108</sup> *Id.* at 42:2.

it if they use it to claim a monopoly on virtue.<sup>109</sup> Like jurors, judges may organize facts in terms of stories, but, as legally-trained, oft-skeptical fault-finders, they have seen too much to fall for fairy-tales. This opening also demonstrates the paradoxical power of the well-placed concession. Keller's introductory concession did not lead into a timid opening that balanced the two sides' claims. Instead, it served as the jumping-off point for the bold claim that despite the specific performance clause, the City was entitled to financial relief only.<sup>110</sup>

### *Summing up the openings*

The opening statements (or lack thereof) in the three trials support a typology with respect to the critical lawyering challenge identified in the Introduction—the ability to establish a shared command of the trial with the judge. The prosecutor in the domestic assault case stepped in just enough to point the judge where she wanted him to go and then quickly stepped back, leaving him to head straight down the path she had indicated. Defense counsel in that case stepped in boldly and stood firm. As will be seen in the next section, this led to repeated friction and static between her and the judge. In the Sonics trial, counsel for the City implicitly but clearly invited the judge to sit back and let the lawyer show her exactly what she needed to know, whereas counsel for the owners invited the judge to join him in the attempt to look deep within the case and within the relationship between the parties to discover the truth. The lawyers in the Safeway trial deferred entirely, setting the tone for a trial in which they served largely as foils for the judge.<sup>111</sup>

---

<sup>109</sup> See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 567 (warning against a case theory that casts the client in "too pure a light").

<sup>110</sup> By the end of the openings, one can see the clash reflecting the cultures of the respective firms involved. Per its website, K&L Gates, the firm representing the city, "comprises 1,800 lawyers who practice in 33 offices located on three continents." K&L Gates, <http://www.klgates.com/about/ourfirm> (last visited Sept. 19, 2009). The firm offers six firm-wide practice areas and "within each of those practice areas is a number of subject matter and industry-based practice groups." *Id.* In contrast, Byrnes & Keller LLP, the firm representing PBC, consists of ten lawyers in one Seattle office. Byrnes & Keller LLP, <http://www.byrneskeller.com/profiles/attorney/byrnes.htm> (last visited Sept. 19, 2009). The tagline on its website reads: "A Firm of Experienced & Dedicated Trial Lawyers." Byrnes & Keller LLP, <http://www.byrneskeller.com/index2.htm> (last visited Sept. 19, 2009). The firm promises "an alternative to the multi-layer management approach to commercial litigation . . . ." *Id.* In light of these self-images, it seems almost natural that the city's opening would spotlight the bureaucratic correctness of its case and the process by which the city came to its decision, while the team's response would seek to humanize the parties and localize the battle, guerilla style, to the terrain on which it stands the greatest chance, the conduct of the city's leaders and associates.

<sup>111</sup> This dynamic reached its high/low point when the prosecutor invited the victim off the stand and into the well of the courtroom to demonstrate how he and the thief were

### III. ENTER THE JUDGE: NARRATIVE DEVELOPMENT DURING EXAMINATIONS AND ARGUMENTS

After opening, as witnesses are called and examined, judges make their marks on bench trials through comments, questions, and rulings. Of course, judges make all manner of mid-trial rulings before juries as well, but these rulings stand merely as rules of law, determining what evidence gets in or what argument is allowed. They reveal nothing about the fact-finder's developing understanding of the case because the jury, not the judge, finds the facts and renders judgment. Freed from the concern over influencing the jury<sup>112</sup> and concerned with the quality of information upon which they will need to act, judges may comment upon evidence and argument and may even intervene to ask questions of witnesses and lawyers themselves. These interventions are episodic; they may arise when a judge is surprised, confused, discomfited or flustered by something counsel is attempting to do. Thus, they will often be less direct but not necessarily less revealing of the judge's thinking than the more structured give-and-take that occurs during closing. Responding in the moment, counsel often lacks the time to reflect upon<sup>113</sup> the larger significance of these judicial interventions and how they open up or foreclose the trial's narrative possibilities. To differing extents and with markedly varied tones, the judges in each of the three cases under review engaged in such practices, as will be described in this section.

#### A. (*The Judge's*) *Past as Prologue*

In their extensive analysis of the jury trial of the officers charged with assaulting Rodney King, Amsterdam *et al.* assert that "[a] juror does not merely 'find' facts but rather constructs a story based on the narrative s/he hears and the worldview s/he holds."<sup>114</sup> The two juve-

---

positioned during his attempt to apply the handcuffs:

*Prosecutor:* (to witness) I know this is kind of awkward, but if you could just show

....

*Judge:* (in playful tone) Well, he has to tackle you first, counsel.

*Prosecutor:* (to witness) If you want to tackle me, go ahead.

*Judge:* (to witness) Now did you take him down real hard on the concrete?

*Prosecutor:* Let's start from the beginning when I'm down.

*Judge:* I love it when the lawyers volunteer to be guinea pigs, particularly the young ones.

Safeway Theft, *supra* note 37, at Disk 3, 18:30.

<sup>112</sup> See Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 233 (2004).

<sup>113</sup> With far fewer breaks (because there are no jurors in need of insulation from prejudicial information or in danger of information overload), bench trials move much more rapidly than jury trials.

<sup>114</sup> Alper, *supra* note 4, at 52; see also Miller *supra* 109, at 562 (citing to a juror's published account in which he tells of how the jurors "told each other stories" because "the

nile cases reviewed here demonstrate how judges are equally prisoners of their experience. Of course, that experience is quite different from that of jurors. Jurors familiar with the subject matter of a trial are typically screened out, whereas judges will often approach a case in the light of other seemingly similar cases. The judge in the Safeway trial was unusually quick to intervene in the trial, and in doing so, he revealed preconceptions both slight and weighty. During a cross-examination of one of the investigating officers, the judge took over after defense counsel fumbled an attempt to establish the location of a broken bottle the officer had found at the scene. Working from what he “would expect from a Safeway,” the judge completed the examination, and concluded by asking counsel, “That’s what you wanted, isn’t it?”<sup>115</sup>

The fact that a judge has a mental schema for the layout of a supermarket is neither surprising nor significant. Most jurors have one as well.<sup>116</sup> The judge’s preconceptions assume genuine importance, however, when they reveal that the judge has a script for trials of this kind, i.e., an expectation that the lawyer will present a witness to provide a certain kind of testimony.<sup>117</sup> For example, during the same direct exam described just above, the prosecutor had asked the officer if she had been able to determine whether the bottle had been broken through criminal activity. The judge had interrupted then as well and admonished the prosecutor:

Counsel, she doesn’t know how the bottle was used. I’m sure you’re going to have another witness tell how the bottle was used but . . . she wasn’t there to see it and I suspect that there’s no way to tell from a broken bottle how it got broken unless, forensically, she can tell me and I’m suspecting she’s not inclined to do that.<sup>118</sup>

---

disputed facts before us would make sense only if we could imagine the worlds around them”).

<sup>115</sup> Safeway Theft, *supra* note 37, at Disk 2, 17:20-50.

<sup>116</sup> In fact, Moore offers a grocery store as an example of a common schema. Moore, *supra*, note 10, at 279.

<sup>117</sup> See John Sharifi, *Approaching the Bench: Trial Techniques for Defense Counsel in Criminal Bench Trials*, 28 AM. J. TRIAL ADVOC. 687, 691 (2005) (“[T]hey have enough experience to know what evidence they are looking for when it comes to a particular criminal charge.”).

<sup>118</sup> Safeway Theft, *supra* note 37, at Disk 2, 3:35-4:10. The judge preceded that admonishment of the prosecutor by chiding defense counsel for not objecting on hearsay grounds. *Id.* at Disk 2, 3:17-19. The balance and substance of these examples demonstrate that this degree of judicial intervention is not necessarily a manifestation of judicial favoritism toward either party. Cf. Doran, *supra* note 12, at 19 (“[P]sychological studies suggest that it is very difficult for active investigators to suspend judgment and weigh evidence dispassionately.”). Even the brief description of the Safeway trial in *supra* Part I shows the judge having difficulty suspending judgment, but the discussion of the trial throughout this Article will reveal that his activism did not necessarily compromise his impartiality.



The judge's suspicion proved correct. The witness said that she did not know how the bottle had been broken. A similar exchange occurred later in the case as the judge contemplated the expected medical testimony:

*Judge:* Is your doctor going to be able to say, "I can testify that he was hit in the head with a bottle?"

*Prosecutor:* No, your Honor.

*Judge:* He can testify he has a lump on his head.

*Prosecutor:* Yes, your Honor.

*Judge:* And he can testify he had a concussion, a mild concussion.

*Prosecutor:* Yes.<sup>119</sup>

This exchange reads like a cross-examination, with the judge asking leading questions and the attorney falling into the role of a submissive, well-controlled witness, assenting to follow the path the examiner has charted.<sup>120</sup> Together, these examples illustrate how a judge's mind may race ahead of the evidence and how critical it is that lawyers anticipate and move quickly to distinguish their case from the category of seemingly similar cases to which the judge has assigned it. Rapid response is especially important where, as here, the judge's early factual suppositions are confirmed.

To his credit, the judge did not stop at pattern recognition and instead continued to actively explore the facts and their possible meaning. This element of the trial is best captured in his consideration of the state's request for a material witness warrant<sup>121</sup> to compel the presence of the youth who allegedly stole the bottle from the store. The proffer offered by the youth's lawyer in support of excusing him from appearing was extremely slight,<sup>122</sup> but the judge denied the state's request anyway. The judge arrived at this ruling after presenting aloud sections from two pseudo-closing arguments, one of which is excerpted here, that addressed the witness's hypothetical testimony as opposing lawyers might have if he had testified.

So, theoretically, [the other youth] said, 'Yeah, I hit him with a bottle.' Security Officer says, 'No he didn't.' Matter of fact, the secur-

---

<sup>119</sup> Safeway Theft, *supra* note 37, at Disk 4, 9:30.

<sup>120</sup> Because the Safeway trial involved an extremely active judge and two inexperienced lawyers (one of whom, defense counsel, was terribly ineffectual, if not constitutionally ineffective), the record in this case offers unusual access to what is ordinarily a largely interior monologue.

<sup>121</sup> WASH. CR. R. 4.10 (2009) authorizes a court to issue a warrant for the arrest of an individual whose testimony would be material but who has refused to comply with (or is not reasonably accessible by) a lawfully issued subpoena.

<sup>122</sup> Having pled guilty and been sentenced, the youth had no Fifth Amendment privilege. Counsel proffered that his memory of the incident was severely limited and that testifying would negatively impact his substance abuse treatment. Safeway Theft, *supra* note 37, at Disk 2, 25:50-26:09, 26:53-27:05.

ity officer doesn't know if anybody hit him with a bottle. And the evidence of the bottle is a broken bottle and the fact that he was knocked unconscious, maybe, for a very short period of time. . . . Wouldn't you think the security officer would know pretty well whether the guy he had on the ground hit him with a bottle or not? . . . He would know, which meant, if he would know, then likely [the other youth] didn't hit him with a bottle. [The other youth] may have thought he hit him with a bottle. The officers may have told [the other youth] he hit [the security guard] with a bottle, and [the other youth] may have said, he may have bought off on that. An Assault 2 rather than a Rob[bery] 2.<sup>123</sup>

This "defense closing" (because it calls into question the severity of the assault and does not implicate the respondent) not only modeled good advocacy for the novice lawyers,<sup>124</sup> it laid bare the judge's view of the trial process and the justice system. The explanation that the young man said what he needed to (truthful or not) in order to take advantage of a desirable plea offer sets this judge apart from many of his colleagues. Despite (or perhaps because of) their daily involvement in the guilty plea process, few judges are willing to be so candid, especially in the crucible of a trial in which that candor carries consequences.

The judge took an equally exploratory approach to the legal issues in the case. Having concluded that the facts had not developed in line with the precedent he had cited in the early-trial chambers conference, he told counsel he would like to "throw two other things . . . legal issues, that you might want to take a look at."<sup>125</sup> The judge then spun two very elaborate and legally intricate variations on the theme of accomplice liability, so elaborate that he stumped himself.<sup>126</sup> Try-

<sup>123</sup> *Id.* at Disk 4, 3:30.

<sup>124</sup> See PAUL BERGMAN, TRIAL ADVOCACY 27-30 (2d ed. 1989) (describing how lawyers can use generalizations to frame arguments and then develop the argument further by showing that the case in question is either an especially strong case for accepting the contested generalization or a case requiring an exception to it). Applied to the Safeway case, this approach works as follows:

Generalization: A person would know if another person hit him with a bottle "especially when" he is a security guard who had the suspect under control.

Generalization: People do not admit to crimes they did not commit "except when" doing so offers some identified benefit and law enforcement officers have told them they did commit the offense.

<sup>125</sup> Safeway Theft, *supra* note 37, at Disk 3, 23:50.

<sup>126</sup> *Id.* at Disk 3, 24:20-25:27:

*Judge:* [I]f his conduct was an effort to allow the person who had taken the wine to retain the property, then, is that an accomplice to the robbery? Because robbery is taking and retaining the property. So if someone has taken it and after the fact, you assist him in retaining it, is that part of the robbery? But he's not charged with robbery. Uhm. Then the question is if he were in fact by that act an accomplice to the robbery, if he was not the one who struck a blow with the bottle, and that was

ing to clarify, he included a wildly inapposite reference to the felony murder doctrine and then dismissed counsel to complete their “home-work.”<sup>127</sup> The logic puzzle the judge had assigned, full of confusing temporal and logical leaps, bore little relation to the straightforward theory the state had presented—i.e., the respondent struck the victim. The judge’s fascination with complicated notions of accomplice liability and “relating back” suggest a legal mind hungry for challenges and seemingly starved by routine juvenile court practice.

Returning to these questions the next day, the judge revealed that his thinking was clouded, even haunted, by a case he had been involved in years earlier. Just before presenting his closing argument, counsel for the state informed the judge that a student intern who was present in the courtroom had completed some of the research the judge had assigned. Even though the judge now realized that he had led counsel down a “bad path,” he invited the student to address the court.<sup>128</sup> The student mis-stated the law, positing that an accomplice could be found liable for the principal’s actions even if he did not know which crime the principal intended to commit. Ruefully, the judge reflected:

That’s what I said when I got reversed in that case, the ‘a’ versus ‘the’ case. I, they came in and wanted a clarification for the jury and I told the jury they don’t have to know the specific crime but they have to know the general nature of the crime. That’s what I said. . . . I got reversed. They said he should have said ‘the’ instead of ‘a’. And that my clarification only made it worse. Now, if they went to my clarification later, they changed it. They said my clarification not only didn’t help, it made it worse. And I got reversed.<sup>129</sup>

As he revisits this moment from his past, the supremely confident star of this one-man legal show yields the stage to a chastened lower court judge who bears the marks of not only being found to have erred (the two references to being reversed) but having “made it worse” (also

---

indeed someone else who was in the robbery, would him being an accomplice to the robbery relate back . . . . [I]f it happened as a result of him helping someone retain the property, would it then relate back to assaults that occurred in the course of the robbery that occurred prior to him attempting to help him retain the property? . . . Does that make sense?

*Defense counsel:* Well, uh, I’m just a little foggy on that. Can you . . . .

*Judge:* Me too. I understand it. It’s hard to (set it out clearly).

<sup>127</sup> *Id.* at Disk 3, 29:22.

<sup>128</sup> Because the student was not licensed for student practice (or even eligible to be so licensed), this was improper, but, as is evident from the discussion thus far, this judge was neither wedded to protocol nor inclined to pass up a chance to entertain an audience.

<sup>129</sup> *Id.* at Disk 3, 38:00. The case in question is *State v. Cronin*, 14 P.3d 752, 758 (Wash. 2000) (“In our judgment, in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.”) (emphasis in original).

stated twice). The personal nature of the experience is evident from his reference to “my clarification” (also stated twice). This judge has not been reversed often, but the impact of this one instance remains evident eight years later.<sup>130</sup>

This episode of mid-trial reflection reveals how personality and lived experience influence trials even when a professional, rather than an ad hoc group of lay citizens, is making the critical decisions. In this respect, this example, though built around the particular history and character of this one judge, is broadly instructive. It shows a judge relating to both the facts and law of a case in a manner fairly close to what jury-derived narrative theory predicts. The story unfolds on multiple levels, and the trial’s narrative ranges far beyond – in terms of both time and place – the incident in question. The trial participants and their activity assume an importance equal to or even greater than that of those involved in the underlying events.

### B. *Resistance Is Mutual*

The judge in the domestic assault case was almost the polar opposite of the Safeway judge, in terms of the frequency (and apparent relish) with which he intervened in the trial. This produced a more subdued or even strained tone, but it did not diminish the volume of information available to counsel as the case progressed, nor did it necessarily indicate rigidity or conclusive pre-judgment. Early on, the judge sent an inadvertent, yet unmistakable signal that he was not receptive to the theory of self-defense. Early in the mother’s direct examination, she testified that her son had called for help. The defense objected on hearsay grounds. The judge overruled the objection, stating, “It’s not hearsay. This is offered to say why she responded in this situation.”<sup>131</sup> As a matter of law, this ruling is unremarkable. The son’s statements are offered for their effect on the hearer (i.e., the mother), not for the truth. Because the defense had depicted the mother as the principal aggressor in its opening statement, her motivation for entering the room was highly relevant. As a window onto the judge’s view of the case, this ruling is a boon<sup>132</sup> for the lawyers. One

---

<sup>130</sup> A Westlaw search turned up no other cases. The force of the experience bears out the suggestion of Guggenheim and Hertz that finding ways to “embed a factual narrative in a legal framework . . . has the additional benefit of a highly useful subtext about the risk of appellate reversal if the judge convicts on evidence the appellate court is likely to regard as insufficient.” Guggenheim, *supra* note 8, at 589-90.

<sup>131</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 17:35-44.

<sup>132</sup> In the previously cited interview with the author, *supra* note 93, attorney Brad Keller referred to a judge’s pretrial involvement with civil litigation as a “gift” for lawyers because it may enable them to discern valuable information about the judge’s understanding. Because the discovery process in criminal and juvenile cases is less formal and less extensive,

would not naturally describe a mother as having “responded in this situation.” One might say that a mother “came into the room” or “went to see what was wrong.” Police, not parents, “respond” to situations. The judge is apparently operating, nearly automatically, according to a script for a Standard Trial in which a police officer describes what led him/her to take certain actions to investigate a case. Writing the mother into this script, the judge accords her a privileged place. Repeated interaction with police officers conditions judges to view them with enhanced credibility<sup>133</sup> and to presume their use of physical force to be justified. Although this example comes from a small moment in the trial, it is hardly trivial. Only minutes after defense counsel had attempted to paint the mother as a wantonly aggressive rogue actor, the judge effectively, if only preliminarily, dismissed this argument.

Like the Safeway judge acknowledging that the case law he thought would control had turned out to be inapposite, the judge in the assault case would soon find that the mother was not up to the elevated role in which he had cast her. Fortunately for the state, its case did not depend upon her credibility, as her son was a far more persuasive witness. Consistent with the motif of subtle, even unconscious, revelation established with regard to the initial hearsay objection, the judge marked the shift in focus from the mother to the son in a pair of linked evidentiary rulings that offer a vivid example of the lawyering challenge of managing such within-trial messages. The prosecutor attempted, over defense objection, to admit the recording of each witness’s conversation with the 911 dispatcher. The judge admitted the mother’s portion of the call and excluded the son’s. Given the mother’s emotional state during the call, her portion easily qualified as an excited utterance.<sup>134</sup> The evidence of the son’s emotional state was less clear, and the prosecutor argued, unsuccessfully, for admission of his recording as a present sense impression.<sup>135</sup> These split rulings<sup>136</sup> generated a highly significant paradox that becomes clear when the witnesses’ testimony is compared as is done below. The ruling admitting the mother’s portion of the recording contained a

---

there are fewer meaningful pretrial engagements, making mid-trial moments, such as the one described in this Article, supremely important.

<sup>133</sup> See Guggenheim, *supra* note 8, at 574.

<sup>134</sup> WASH. R. EVID. 803(a)(2) (2008).

<sup>135</sup> *Id.* 803(a)(1). Because both declarants were available for cross-examination, admission of either recording would not violate the respondent’s confrontation right under the Sixth Amendment, as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>136</sup> The judge’s awareness of the distinction he was making was evident from his comment excluding the son’s portion: “The part of the 911 tape that mother was on is in, but not this part.” Domestic Disturbance, *supra* note 40, at Disk 2, 7:51.

favorable signal for the defense, while the ruling excluding the son's portion sent a countervailing and nearly dispositive sign of good news for the state.

The content of the two witnesses' testimony overlapped considerably, but mother and son presented nearly incompatible personas and narratives. As the victim and the only adult present during the incident, the mother ought to have established both the emotional force and the logical authority of the state's case.<sup>137</sup> She failed terribly at the latter and may have offered too much of the former. Always ingratiating in manner, she told a story that was often overheated, at times implausible, and riddled with contradictions, both with her own prior statements and her son's later testimony. Even before her direct examination was over, the judge had ample reason to doubt her reliability.<sup>138</sup> The mother's candid admission that she "responded," to use the judge's loaded term, to her daughter's kicking by picking up a clothes hanger and "poking" at the girl while she was trapped beneath the door must have fuelled the judge's doubts about her judgment. The fact that she retreated to the bathroom even before she realized she had been injured, leaving her son to deal with his still-agitated sister, further eroded the authority she ought to have wielded as the only adult in the home.

In almost every way that the mother was flawed as a witness, the son was strong. He provided one crucial narrative element which the mother could not, namely a precipitating event to the entire episode: his entry into his sister's room to pick up the phone. This is a trivial incitement, for sure, but no less believable for that. It is critical because it does what neither lawyer had done: normalize the incident. Many families have seen disturbances set off by such tiny, seemingly harmless, sparks. The unhistrionic tone and logical and complete substance of his testimony aligned with the persona established within the very brief introduction to his examination. A seventeen-year-old high school student, a lifeguard, and an older brother, he was the only person the mother could turn to for help. Ultimately, he assumed near-parental status, first coming to the sister's aid, then the mother's, and

---

<sup>137</sup> See BURNS, *supra* note 8.

<sup>138</sup> To take just one example, the mother testified that after slashing at her with a clothes hanger, her daughter "basically took the door and started swinging the door at us and hit us, well she hit me with the door, on my arm as well." Domestic Disturbance, *supra* note 40, at Disk 1, 29:45. Even before the son contradicted this testimony, describing how Michelle held (not swung) the door and bumped into him (not his mother), the judge could see that the respondent was small in stature and unlikely to be swinging a large closet door around like King Kong wielding the top section of a skyscraper. Early in the cross examination, the mother admitted that the door was "not a hollow-core. It's not light. It's not something that I'd like to go pick up." *Id.* at Disk 1, 48:00.

eventually serving as the intermediary with the police. This pattern continued at trial as he held the state's case together.

After the prosecution proffered the son's recording as a present sense impression, the defense clarified its original objection by saying that he had already testified as to what he saw and "there's no need for any further testimony about that."<sup>139</sup> To the extent that the objection was based on cumulativeness, the judge should have denied it. The hearsay exception for present sense impression testimony is premised on the notion that statements made contemporaneously with an observation about the matter being observed are reliable enough to not require an oath or cross-examination.<sup>140</sup> Thus, the recording is in some important sense better evidence than and certainly not cumulative of the testimony. Nevertheless, the judge excluded the son's portion of the recording, making a point of stating that the record should reflect that he had not "even listened to the second part so [couldn't] be prejudiced by it."<sup>141</sup> Thus adverting indirectly to an appeal which could come only if the judge found the respondent guilty, the judge offered an unintended ironic endorsement of counsel's argument that there was "no need" for further evidence regarding the son's perceptions. The mother's testimony, plagued with holes and hyperbole, required supplementation with the recording. The son's superior testimony did not. In fact, it would eventually serve as the main basis for the court's finding of guilt. The legal issues prompted by the 911 calls would have been identical in a jury trial, and there would be no reason for the judge to have ruled differently with a jury in the box. The absence of a jury, however, gave defense counsel warning of the need to shift narrative strategy to focus on the son before his testimony was complete.<sup>142</sup>

Defense counsel did not have the benefit of the comparison between the evidentiary rulings while the mother was on the stand (as the son had yet to testify). Nevertheless, the mother's time on the stand provided ample indications of the futility of a narrative built upon her inadequacy as a witness. The recording of the mother's conversation with the 911 dispatcher was gripping in a way that her testimony never was. The call ended with a ten-second interlude of sobbing and wailing that seemed to require the several seconds of silence in the courtroom that followed its airing. The recording did not

---

<sup>139</sup> *Id.* at Disk 2, 7:31.

<sup>140</sup> EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 453 (2008) ("The guarantee of trustworthiness is contemporaneity . . .").

<sup>141</sup> Domestic Disturbance, *supra* note 40, at Disk 2, 7:58.

<sup>142</sup> Of course, these developments ought to have likewise signaled to the prosecutor that she should frame her case around the son's testimony rather than that of the mother.

bolster her credibility; it vaulted her past the question of credibility. In important respects, once the recording was played, the mother ceased to be a witness, i.e., an actor in trial whose reliability could be tested or challenged. Instead, she assumed the primary identity of victim or survivor—i.e., an embodiment of the harm the respondent had allegedly caused. She had a symbolic, rather than pragmatic, role.

The mother appeared quite content in this spectral role. Confronted early in her cross-examination with a purportedly inconsistent statement, she mused aloud, in apparent earnest, “I wonder what David would say, if David remembers which it was.”<sup>143</sup> With this, the mother disavowed the authority both the state and the judge had invested in her at the trial’s outset. As the parent and the only adult present during the incident, she ought to have been the one who could be counted on to eliminate doubt. Instead, she raised doubt and left it for her son to clear up. Just as she had handed off the phone to him during the incident, she essentially abdicated her seat on the witness stand, agreeing to defer to whatever her son might say.

Despite the fact that her target had been doubly removed, once by the recording and once by the witness’s own surrender, defense counsel carried through with the plan of attack signaled in her opening. With technically sound impeachments, counsel achieved some measure of success. The witness admitted inconsistencies between her testimony and prior statements she had made. However, the mechanics of the impeachment undermined its impact, and more important, the attack re-enacted the state’s core narrative and alienated the judge. Counsel properly began the impeachment by drawing attention to the testimony to be impeached:<sup>144</sup>

*Counsel:* When you got there you saw David trying to grab onto the door to avoid it falling on Michelle, is that your testimony?

*Witness:* Yes.<sup>145</sup>

Counsel then led the witness to admit to having made an inconsistent statement during a pretrial interview with counsel. Counsel did this so deftly that the witness not only admitted the prior statement, she herself pointed out the inconsistency: “According to this one, I said the door’s already on her and then I said it wasn’t on her.” The judge interrupted at this point, “Which is it? That’s what she’s asking.”<sup>146</sup> On paper, the judge’s question appears to be a neutral reframing of counsel’s question. On the recording, however, his tone communicates withdrawal. The emphasis is on “she’s” rather than “that’s.”

---

<sup>143</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 54:20.

<sup>144</sup> See LUBET, *supra* note 54, at 126.

<sup>145</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 48:20.

<sup>146</sup> *Id.* at Disk 1, 53:52.



Counsel may believe the answer is crucial, but the judge appears not to. This is not an unusual result. A highly experienced and accomplished public defender has shared with the author that practice in juvenile court bench trials taught her long ago that judges typically do not see in impeachments the destructive power attorneys intend.<sup>147</sup>

A later example from the domestic assault trial suggests this disconnect is not always due to judicial resistance to persuasion. Again displaying textbook form, defense counsel asked the mother if her memory of the incident was better, fresher, at the time of the pretrial interview than now at trial. Earlier equals better, who could dispute that? The witness didn't. The facts here, however, did not compel, or even much support, this inference. The two statements being compared (direct testimony and pretrial interview) were much closer in time to each other than either was to the event in question. There is no reason to think that the witness's memory suffered any serious deterioration in the two weeks between the interview and the trial.<sup>148</sup> It is entirely reasonable for the judge to believe that the trial process over which he presides is more conducive to eliciting the truth than the informal, lawyer-driven interview process.

The most potent disconnect between lawyering technique and narrative sensitivity occurred a little later when defense counsel presented the mother with a transcript of the interview and directed her to the pertinent page and lines:

*Counsel:* . . . [R]ead a couple of lines down.

(10 seconds of silence)

*Counsel:* Let me know when you're done.

(16 more seconds of silence)

*Counsel:* I'm just asking you to read line 19 to about line 22.

(10 more seconds of silence)

*Witness:* Uh-hum.<sup>149</sup>

The witness eventually went where counsel led her, saying, "If I said it was on her in that one, at that time, that was, my memory was fresher. . . The door might have been already on her. . . . I'm sorry, I'm

---

<sup>147</sup> Email from Floris Mikkelsen, Director, The Defender Association, to the author (August 29, 2009, 11:51 p.m. PST) (on file with author); *see also* Guggenheim, *supra* note 8, at 574 ("In cases in which an officer's testimony is contradicted by previous statements or other officers' testimony, the judge is likely to presume that the inconsistency stems from a mistake or misunderstanding, rather than from fabrication.").

<sup>148</sup> Juvenile court procedure doubly reduces the potential effectiveness of impeachments such as the one discussed here. The timeframe for trial is compressed compared to most criminal cases (generally a positive feature in that it enables the service component of the juvenile court to engage the youth closer in time to his offending), and counsel generally lacks the power that civil litigators wield to force witnesses to make their pre-trial statements under oath.

<sup>149</sup> Domestic Disturbance, *supra* note 40, at Disk 1, 51:30.

trying to remember.”<sup>150</sup> However, the empty silences here were no match for the pregnant silence which followed the state’s airing of the 911 call.

By the time counsel moved on to another similar impeachment, the judge seemed to have run out of patience. When counsel asked a question about whether the mother had said that the door was covering the girl below her knees, the judge interrupted to ask, “Counsel, I’m wondering what difference is it going [to make]?”<sup>151</sup> Defense counsel had not only fought her way into a corner, losing the judge in the process, she had unwittingly reinforced the state’s framing of the case around the aggressiveness of an unreachable and unfathomable adolescent. The cross-examination of the mother was a conventional effort in credibility destruction. It was technically sound and, at points, convincing. It did not, however, account for the way the case (and the mother’s role within it) had developed. Destroying her credibility was no longer necessary, sufficient, or even helpful, and, in working so hard to achieve this destruction, counsel cemented herself and the judge in adversarial postures that were disadvantageous for her client. With each attack, counsel led the judge to entrench himself more strongly in the position of protecting the mother, the position which the state had invited the judge to adopt in its opening, with its rhetorical emphasis on the domestic violence aspect of this case. An identical examination might well have induced similar reactions on the part of jurors. Because this was a bench trial, counsel had the opportunity to see this resistance developing and make needed adjustments.

### C. Plain and Simple

The friction that emerged from defense counsel’s impeachment of the mother in the domestic assault case should not be over-interpreted to mean that bench trials are no place for aggressive cross-examination. The Sonics trial offers an example of a devastating examination. As will be seen, the trial also shows a judge who marshals her words (and her interruptions) carefully, but delivers them pointedly when she chooses to speak.

Seattle Mayor Greg Nickels was the City’s first witness. Keller’s cross-examination concluded with a devastating sequence linking the City to the “forced bleeding” strategy:<sup>152</sup>

*Keller:* And in July of that summer, did Mr. Walker meet with mem-

---

<sup>150</sup> *Id.* at Disk 1, 54:15.

<sup>151</sup> The last words are inaudible, but the meaning is clear. *Id.* at Disk 1, 59:05.

<sup>152</sup> This examination began with an equally effective, albeit less aggressive, sequence demonstrating the futility of the lease for both the city and the team under current financial conditions. See *infra* note 173.

bers of your administration to talk about making it too expensive and litigious for Mr. Bennett?

*Mayor Nickels:* It appears, it appears that Mr. Walker did meet with members of my administration sometime around July 24th. . . .

*Keller:* Do you see the reference in the email about a message fighting PBC's attempt to leave?

*Mayor Nickels:* Yes. . . .

*Keller:* [The email] says . . . make it too expensive and too litigious for him. I get the impression they, "they" there refers to the City administration personnel, right?

*Mayor Nickels:* I believe so.

. . .

*Keller:* And it certainly has become litigious, hasn't it?

*Mayor Nickels:* It has.

. . .

*Keller:* Certainly has become expensive, right?

*Mayor Nickels:* Yes.<sup>153</sup>

This examination was apparently still ringing in the ears of the City's lawyers two weeks later. Seeking to repair the damage, they sought to call Deputy Mayor Tim Ceis in rebuttal to distance City officials from the damning PowerPoint presentation.<sup>154</sup> The owners' lawyers objected, claiming that their ability to explore these issues in discovery had been limited by the City's invocation of the attorney-client privilege.<sup>155</sup> Attorney Paul Lawrence argued that the information about the PowerPoint was not within the privilege claim (and thus could have been explored in discovery) because any involvement Slade Gorton might have had with the PowerPoint was in the course of his separate work on behalf of the prospective local ownership group and not within his capacity as counsel for the City.<sup>156</sup> This set up the following exchange:

*Judge:* You are saying that Mr. Gorton's activities and Mr. Walker's activities with the Ballmer group were inside the scope of the engagement letter?

*Lawrence:* No. They were inside the scope of the carve-out that was provided to the city.

*Judge:* And so that was all carved out and you didn't have any obligation to tell your client what you were doing?<sup>157</sup>

Even on the cold page of the transcript, the judge's tone of disapproval when she said "so that was all carved out" is unmistakable. With this ruling, she also delivered an important message about the

---

<sup>153</sup> Basketball Transcript, *supra* note 77, at 99-102.

<sup>154</sup> *Id.* at 45:22-46:2.

<sup>155</sup> *Id.* at 50:4-18.

<sup>156</sup> *Id.* at 57:23-58:1.

<sup>157</sup> *Id.* at 59:1-8.

threat she perceived the carve-out to pose to core values of the legal profession. Stating that the Sonics ought to have had the chance to depose Gorton with respect to “his dual representation and the confidences that he may have been passing from one group to the other,”<sup>158</sup> she condemned a distinguished fellow lawyer in terms no member of the bar could miss. “Dual representation,” is often problematic, and passing confidences absolutely dishonorable.<sup>159</sup> Heading into closing, counsel was on notice that the judge saw something quite “wrongful,” to use a term from the City’s opening, buried within its case.

The examination of witnesses has an obvious narrative component in that it is the primary means of presenting the finder-of-fact with the materials from which the conclusive story of the trial shall be constructed. As described in this section, bench trials frequently produce engagements between counsel and the judge that themselves become crucial moments in the trial narrative. Like defense counsel in the domestic assault case, the City’s lawyers found themselves athwart the judge. It would thus be essential that they attempt in closing to address this conflict in a way that aligned with their ultimate advocacy goals. Failing to do so would muffle their closings, however logically sound or solidly rooted in evidence they might be.

#### IV. THE LAST DANCE: CLOSING ARGUMENT AS A NARRATIVE CLIMAX

The finality of closing argument challenges lawyers to stretch their performance skills to their limits, and the most successful advocates command the floor by means of a full repertoire of moves. In the trial that has served as the focus of Philip Meyer’s trilogy of narrative articles, defense attorney Jeremiah Donovan “sometimes strode and other times tip-toed in front of the jurors. He shouted, then whispered, and waved wildly with his arms. [The judge] hid his face to cover a smile, and the audience guffawed out loud.”<sup>160</sup> Meyer

---

<sup>158</sup> *Id.* at 66:4.

<sup>159</sup> In the course of her exploration of the record with counsel, the judge had observed the unremarkable principle that “we value the confidences of the lawyers with their client to keep those secret.” *Id.* at 64:15-16. The record does not show that Gorton ever improperly disclosed any client confidences, but the blurred lines created what the judge deemed to be a genuine risk of this.

<sup>160</sup> Meyer, *Desperate III*, *supra* note 24, at 733 (quoting Edmund Mahony, *Defendant Takes Hits From Both Sides*, HARTFORD COURANT, July 17, 1991, at D1). For a report on a similar performance, even more outsized, reflected in part by the fact that it took place during opening statement, see Henry Blodget’s description of Robert Morvillo’s opening statement in defense of Martha Stewart. Henry Blodget, Opening Statements, SLATE, Jan. 28, 2004, <http://www.slate.com/id/2094441/entry/2094561/> (“At times, Bob Morvillo’s voice completely filled the cavernous courtroom . . . . At times, he nearly whispered. At

presents this argument as a demonstration of a “surreal, post-modernist electronic dance”<sup>161</sup> between popular and legal storytelling. The terminology here may overstate the novelty of such forms of advocacy,<sup>162</sup> but Meyer is certainly right to see the complexity with which the best closing arguments are constructed, even in their most seemingly off-hand or casual moments.<sup>163</sup> The care with which lawyers build these concluding moments leaves them extremely reluctant to cede even the slightest bit of control over the production. The extent of this desire for control can be glimpsed from a failed attempt at procedural innovation which I observed several years ago. A trial judge proposed allowing jurors to ask the lawyers questions before closing arguments. It was by then routine for judges to allow jurors to submit potential questions for witnesses, but the idea of having the jurors submit questions to the lawyers was far more radical. In the judge’s eyes, this innovation, which he made optional, would benefit all involved. The jurors would have their primary concerns addressed. The lawyers would learn what the people they needed to persuade were thinking. These potential advantages notwithstanding, lawyers were unwilling to surrender even a modicum of creative control over their performance. I never saw nor heard of any lawyers electing to be questioned, and those I spoke to about the idea expressed something close to horror. Asking jurors what was on their minds would grant undue weight to thoughts they had formed without the benefit of the lawyers’ arguments. The only way to measure the worth of the juror’s questions, it seems, was by whether the lawyers deemed them significant enough to address in closing without having heard them.

Bench trial lawyers may likewise aspire to keep the judge in rapt

---

times, he prowled the aisles like a grizzly bear, swiping paws, roaring in indignation; at times, he learned on the edge of the jury box, as cuddly and unthreatening as a koala.”).

<sup>161</sup> See Meyer, *Desperate II*, *supra* note 24, at 933. This assessment is founded upon the lawyer’s use of jump-cut chronology, highly visual imagery, and visual aids.

<sup>162</sup> Like Jeremiah Donovan, Robert Morvillo is a self-proclaimed “no-nonsense” trial lawyer, who would almost certainly reject the post-modernist label. See Colgate University News & Events, <http://blogs.colgate.edu/2007/12/robert-morvillo-60-speaks-at-i-html> (last visited Sept. 19, 2009); see also Miller, *supra* note 109, at 552 (observing that when lawyers engage in thoughtful narrative lawyering, “the story we tell is not so different from the kinds of stories that good lawyers have been telling for years”).

<sup>163</sup> Jeremiah Donovan has analogized his use of fractured chronology to the flirtatious prolonging of a date’s potential romantic interest. Jeremiah Donovan, *Some Off-The-Cuff Remarks About Lawyers As Storytellers*, 18 VT. L. REV. 751, 756-57 (1994) (“When I talk to juries in my closing argument I think back to my bachelor days, and the jury is my date. We just saw a movie and we’re drinking coffee and talking about the movie. I talk about the trial as if it were the film we saw. . . . I talk directly to a particular juror . . . ‘Remember the part where Sonny Castagno said that he was going to give Jackie Johns a call that night? Do you know why that was so important?’ . . . and then I’ll talk about something else. . . . Now the jurors are dying to know why I think what Castagno said was so important. At the end, when I finally come back to it, they will be all ears.”).

silence, but they cannot prevent audience participation. In fact bench trials reverse the dynamic, leaving the lawyers at risk of being unable to address *their* main concerns. Unlike the jurors, the lawyers cannot be silenced, only disregarded. The lawyers' narrative options and strategies in closing can be evaluated in terms of how they accommodated the judges' personalities, history, and conception of their role as the judges revealed them during the trial. The Safeway and Sonics trials illustrate the extent to which the process of collective creation which marks bench trials can be intensified in closing. In stark contrast, the judge in the domestic assault case remained aloof, seemingly well beyond the reach of counsel's arguments. Reviewed as a group, the trials call for an adaption to Meyer's metaphor: bench trial closing is a highly traditional form of dance, one in which lawyers must coordinate their movements with the judge, leading when they can and following when they must. Dazzle has less value, and nimbleness is at a premium. This section will look first at the Safeway trial, because the judge's activity makes plain so much that is often hidden from view. Next, the Sonics closings will be analyzed, again in some detail because they are rich with narrative detail. Finally, the domestic assault case will be considered as a particularly challenging lawyering dilemma.

#### A. Judge as Seeker, Lawyers on the Sidelines

As he had throughout the trial, the Safeway judge asserted a strong controlling hand over the closing arguments, beginning with the framing question referenced earlier, "Based on the testimony, he's guilty of something. What is it? That's what I want to hear your argument."<sup>164</sup> As it turned out, the judge did not show much interest in counsel's argument. He afforded the prosecutor no more time to address the pivotal issue he himself had raised—the degree of assault<sup>165</sup>—than he had allotted the intern for the extraneous accomplice liability issues. Citing common sense and policy, the prosecutor argued that even a minor concussion constituted substantial bodily harm, making this a second-degree assault, because the victim was at grave risk, unable to protect himself from any further danger.<sup>166</sup> The court rejected this sensible analysis, explaining:

---

<sup>164</sup> See Safeway Theft, *supra* note 37.

<sup>165</sup> Because Washington has a determinate juvenile sentencing scheme, *see* WASH. REV. CODE § 13.40.0357 (2008), this is a more important fight than it might be under other states' juvenile justice codes, many of which have indeterminate schemes. Assault in the Second Degree is a B+ offense for which the presumptive sentence range is 15-36 weeks. The presumptive range for Third Degree Assault includes probation and no more than 30 days in detention. *Id.*

<sup>166</sup> The following exchange from the prosecutor's closing confirms Sharifi's observation

You knock somebody out, you put somebody in a coma for a week which is temporary or a few hours which is temporary, I would certainly say that is substantial bodily harm. But to say that when you're out playing football and you run into somebody and you're dazed and two seconds later you wake up you've suffered substantial bodily harm, I don't buy it. I don't think that is, particularly, when you can probably get up and keep playing the game until you get knocked out a few more times and the coach pulls you from the game and says, "Enough's enough."<sup>167</sup>

The prosecutor would have been justified in feeling blindsided by the judge's football metaphor.<sup>168</sup> It is hard to imagine a thoughtful defense attorney offering this comparison to a jury. (Referring to a week-long coma as "temporary" is technically accurate, of course, but grossly insensitive.) The difference between an injury incurred within the rules of a game freely entered and one that resulted from a theft (i.e., an act wrong in itself) followed by a double-teaming sucker punch to the back of the head is seemingly so plain as to rebut itself. Given the chance to rebut, the prosecutor might suggest that the cowardly nature of the punch makes it far more characteristic of disreputable professional wrestling than of football.

However legally and rhetorically dubious, the football metaphor expresses something essential about the judge's view of the trial as a

---

that "Closing argument in a bench trial can be similar to an appellate argument." Sharifi, *supra* note 117, at 698:

*Judge:* Assault two has different ways of doing it.

*Prosecutor:* That's correct, Your Honor.

*Judge:* And your way here is . . . ?

*Prosecutor:* My way is that he assaulted another and thereby recklessly inflicted substantial bodily harm . . . .

*Judge:* Substantial bodily harm. What's the definition?

*Prosecutor:* . . . . [B]odily injury which involves a temporary but substantial disfigurement or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ. . . .

*Judge:* Your argument that anytime you hit somebody and knock them out, that's substantial?

*Prosecutor:* Absolutely.

*Judge:* And you do it under substantial bodily harm meaning loss of brain power.

*Prosecutor:* Yes.

Safeway Theft, *supra* note 37, at Disk 4, 41:00.

<sup>167</sup> *Id.* at Disk 4, 51:00.

<sup>168</sup> There was an easily-missed foreshadowing of this ruling in the mini-closing excerpted above, *supra* text accompanying note 123, where the judge said: "And the evidence of the bottle is a broken bottle and the fact that he was knocked unconscious, maybe, *for a very short period of time.*" *Id.* at Disk 4, 3:33 (emphasis added). The duration of the concussion had no relevance to the issue then under discussion, so the fact that it emerged in the judge's thinking even then reflects its salience to him. As the prosecutor was focused on arguing for the material witness warrant, there is almost no way that the prosecutor could have registered this hint.

quest.<sup>169</sup> The task of judgment is an intellectual one, with logical demands and moral ramifications, but throughout the trial the judge referred to his task in terms evoking physical activity and movement. When defense counsel raised a routine preliminary objection to the use of the term “victim” by the state’s witnesses, the judge replied, “I’ll deal with it. *I can cut through that.*”<sup>170</sup> In other words, trivial semantic concerns won’t impede his progress. When the judge excused the youth who had taken the bottle from testifying, he stated, “I don’t see a compelling need to bring [him] in. *I don’t see that it gets me very far.*”<sup>171</sup> Denying the routine defense motion to dismiss at the close of the evidence, the judge acknowledged that there was sufficient evidence for a hypothetical fact-finder to conclude that the victim had been struck with a bottle, but then added “I think I’ve signaled that I probably won’t get there.”<sup>172</sup> With this, the judge signaled the span he envisions between logic (i.e., what might have occurred or how he could justifiably rule) and action (i.e., what really happened or how he will actually decide).

Approaching his task as a journey, the judge excluded evidence if he did not believe it would move him forward. He dispatched witnesses quickly once he had assessed the contribution they could make to his progress.<sup>173</sup> With others, he was willing to expend extra effort to screen the evidence before taking it on. On direct examination, the prosecutor had led the Safeway manager to affirm that the second youth (i.e., the one who had not entered the store) “was basically on top of” the security guard during the scuffle in the parking lot.<sup>174</sup> Keenly attuned to what the witness meant to say, the judge interrupted and conducted a mini-examination of his own during which the witness acknowledged that he did not see that second youth get at all

---

<sup>169</sup> See Amsterdam, *supra* note 21, at 64-65 (describing how defense closing was modeled on an archetypal “Quest of the Hero” narrative, culminating in acknowledgment that lawyer was asking jurors to do “one of the hardest things that you have ever been required to do in public”).

<sup>170</sup> Safeway Theft, *supra* note 37, at Disk 1, 13:15 (emphasis in original).

<sup>171</sup> *Id.* at Disk 4, 30:14 (emphasis in original).

<sup>172</sup> *Id.* at Disk 4, 31:52.

<sup>173</sup> As the case shifted from the pretrial motion to the trial on the merits, the judge summarized the officer’s motion testimony and extracted what was relevant for the trial, stating, “That’s all I need from his prior information.” *Id.* at Disk 1, 56:10. The judge took a similar approach to the testimony of the ER doctor:

*Judge:* Can you say, based on your examination, what he was struck with in the head?

*Doctor:* No.

*Judge:* Thank you. That’s all I need.

*Id.* at Disk 4, 9:30.

<sup>174</sup> *Id.* at Disk 2, 51:05.



close to the victim.<sup>175</sup>

With its repeated clashes and strenuous exertion, football is an apt parallel for the judge's high level of activity throughout the case.<sup>176</sup> His keen attention and frequent intervention throughout the trial constitute a form of discipline, a means of staying fit. On a football field, momentary lapses in discipline can be devastating. The judge carries the memory of his years-old legal lapse close to the surface, but his zealous protection of the record, as with the store employee described in the preceding paragraph, goes well beyond that which would be necessary merely to avoid reversal. It appears to be failure ("making it worse") that he seeks to avoid. Supremely confident in his own abilities to reach his destination, he does not want to give the lawyers or witnesses a chance to weigh him down with unneeded or flabby questions, answers, or arguments. Taking responsibility for all phases of the trial and holding himself to high standards, the judge assumed the role of a traditional male warrior-hero, the sort of figure often invoked by football coaches who keep sending players back into the game until "[e]nough's enough."

The judge's reliance, conscious or otherwise, on this construct reflects a process of narrative construction similar to that seen in jury trials. In their analysis of closing arguments in a jury trial, Amsterdam and Hertz present the defense attorney's closing as patterned upon a call to the jury to undertake a prototypical heroic quest, citing to Joseph Campbell and his observation that "popular tales represent heroic action as physical."<sup>177</sup> The Safeway judge's particular way of conceiving and articulating his role is simultaneously timeless and time-bound. As this Article goes to print, Washington youth sports coaches are entering their first season under the state's Lystedt law which requires that any athlete removed from a game with a concussion may not return until examined and cleared to play by a licensed health care provider.<sup>178</sup> Thus, the judge's sense of the significance of a concussion, undoubtedly rooted in his own personal history and cultural background, was out of step with the law and likely also with the mind-set of the much younger prosecutor.

---

<sup>175</sup> *Id.* at Disk 2, 51:57.

<sup>176</sup> See BURNS, *supra* note 8, at 181-82 ("The trial is a space in which the agonistic or competitive phase of civilization still lives. It confers on the exertions of all the participants 'a certain ethical value in so far as it means a testing of the player's prowess: his courage, tenacity, resources, and last but not least, his spiritual powers—his fairness.'").

<sup>177</sup> Amsterdam, *supra* note 21, at 65 n.23 (quoting JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 38 (1968); citing to numerous other examples of the heroic quest).

<sup>178</sup> WASH. REV. CODE § 28A.600.485 (2009).

*B. Becoming A Target: A Lawyer in the Judge's Crosshairs*

In its closing in the Sonics trial, the City eschewed both dazzle and nimbleness, offering instead the steadiness that had characterized its opening. This mirroring showed in the language and structure of the closing, which resurrected the emphasis on “public policy.”<sup>179</sup> Having told the judge in opening that the trial would be routine because “the lease says what it says,” in closing, counsel largely ignored the trial that had in fact taken place. Counsel’s argument made no adjustments for the success the opposition had achieved in establishing its two principal points: the inadequacy of the lease and the questionable dealings behind the effort to force a sale. That so much of the damage on these points had occurred during the cross-examination of Mayor Nickels,<sup>180</sup> the City’s first and most high-profile witness, only heightened the salience of the testimony and the necessity of crafting a response that addressed this major trial event.

Having sat silently, per custom, during the opening, the judge made clear early on that she would not do so during closing. She confronted counsel with the owners’ argument about the lease: “[D]oesn’t the lease also have a reciprocal agreement? . . . Wasn’t . . . part of what was bargained for that the City had to maintain its property as a viable venue?”<sup>181</sup> In response, Lawrence leaps all the way over the testimony, seeking refuge in the text of the lease: “There was nothing in the lease—you can look at the lease back and forth—that required the City to keep the facility as a state-of-the-art building for the entire 15 years of the lease. . . .”<sup>182</sup> The judge had not suggested the arena needed to be state-of-the-art, only “viable.” The judge undoubtedly noted the evasion. A little later, counsel claimed that “The only person who has suggested the lease should be rewritten . . . was Mr. Bennett’s group.” The judge again interrupted, pointing again to the trial testimony: “[I]s that really quite true? I mean basically Mr. Schultz

---

<sup>179</sup> Basketball Transcript, *supra* note 77, at 72:6-11 (“The point is that if the City, in entering into the Key Arena lease, was entitled to make public-policy decisions to obtain certain benefits, and the City in deciding to enforce the lease also is making a public-policy decision to obtain the benefits, tangible and intangible, that flow from having a sports stadium here in Seattle.”).

<sup>180</sup> Mayor Nickels had affirmed Keller’s assertions that “an NBA franchise in today’s world can’t be viable in Key Arena under this lease arrangement” and “this lease didn’t play out the way the City believed it would be when this 15-year vow was taken.” *Id.* at 73-76. The cross of Mayor Nickels was similar to, but perhaps more impressive than, that described by Edelman. See *supra* text accompanying notes 31-33. The officer whose testimony Edelman discusses was a colleague and thus natural ally of the defendants in that case. Mayor Nickels was squarely opposed to the Oklahoma-based owners trying to move the team out of his city.

<sup>181</sup> Basketball Transcript, *supra* note 77, at 75:13-18.

<sup>182</sup> *Id.* at 76:12-15.

was down at the legislature trying to get to a different spot. And isn't that inherently saying to the City 'we want out' . . . ?"<sup>183</sup> Lawrence resisted the judge's invitation to join the effort to make sense of this complex bilateral relationship and offered instead an over-simplified and, to the judge, unrecognizable universe in which everything is painted in black and white.<sup>184</sup> Counsel's extreme formulations (e.g., "nothing in the lease," "the only person," "state-of-the-art") distanced him from the judge, who was carefully picking her way through the facts, looking for a solution that acknowledged merit and fault in both parties. Lawrence's lawyerly parsing of words stirs up undesired echoes of the carve-out discussion that immediately preceded the closing. Counsel is rhetorically isolating himself, an exile quite similar to the more literal one which the judge would soon propose for his firm due to the conduct of his colleague Slade Gorton.<sup>185</sup>

When Judge Pechman asked counsel if a ruling for the City would result in an endless series of squabbles over management issues, he assured her that "[t]hese are sophisticated people who can get along once they understand what the rights and obligations are."<sup>186</sup> After a back-and-forth exchange about the few generally unsuccessful meetings between the parties, the judge commented, "That's not real sophisticated when they both go to their own corners and refuse to talk with one another, is it?"<sup>187</sup> Here we see the judge, a woman, looking at the powerful men involved in this dispute (and the principals in this case are indeed all men), as children, each ready to take his ball and go home when the others refuse to play the game his way. As Lawrence tried to talk his way out of this corner, he wound up taking the fire the judge seemed to want to direct at these not-so-sophisticated

---

<sup>183</sup> *Id.* at 80:10-13.

<sup>184</sup> See Philip N. Meyer, *Making the Narrative Move: Observations Based upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 CLIN. L. REV. 229 (2002) (describing closing in which attorney Gerry Spence cast Ms. Silkwood, the decedent for whom he spoke, the various Kerr-McGee employees, and even himself as actors in a morality tale). Spence told the jurors: "I have never seen a company who so misrepresented to the workers." *Id.* at 263.

<sup>185</sup> The judge eventually asked if it would be possible to "ameliorate the harm here to the Sonics" by ordering K&L Gates to sever its ties with the city. Basketball Transcript, *supra* note 77, at 115. Lawrence's struggles in this regard are quite similar to those that defense counsel experienced in the domestic assault case as she persisted in attacking the mother. See *supra* text accompanying note 151. They also call to mind Meyer's comments on the lawyers in the Amsterdam & Hertz article: "They are making language choices, employing metaphors, storytelling devices and techniques that are not always to their own advantage. Most important, they seem somehow unaware of the strategic storytelling choices that they are making at crucial junctures in their argument." Meyer, *supra* note 184, at 242.

<sup>186</sup> Basketball Transcript, *supra* note 77, at 1106:9-11.

<sup>187</sup> *Id.* at 90:9-11.

power brokers:

*Judge:* Mr. Lawrence, answer my question.

*Lawrence:* I'm trying to.

*Judge:* Did the mayor ever call Mr. Bennett back and say let's sit down, let's talk about this, and see what we can do?

*Lawrence:* The mayor—

*Judge:* I didn't hear it.

*Lawrence:* The mayor's position has been consistent that he's willing to talk about—the only thing he's willing to talk about is something that would allow the Sonics to stay through the end of the lease and hopefully something future going forward. Since that was not a discussion that Mr. Bennett was willing to have, there was no discussion.

*Judge:* So answer to my question is no?

*Lawrence:* Not—the mayor was not willing to sit down and discuss an early exit, correct.

*Judge:* Let's move on.<sup>188</sup>

The judge's frustration mounted as this dialogue progressed and it became clear the parties had never attempted what she would consider meaningful negotiations. Her tone while pushing counsel to acknowledge this fact is that of a lawyer cross-examining an evasive witness or, much the same, a parent who has caught a teenage child in a half-truth. Plainly, this is a situation lawyers need not fear in a jury trial. This example epitomizes the point raised during the discussion of opening statements about judges' ability to hone in on weakness in a lawyer's presentation.<sup>189</sup>

Apparently trying to draw (or push) the parties into productive settlement discussions by letting them see clearly what the case looked like to her, the judge continued to hammer away at the missed chances to settle. She acerbically confronted Lawrence with yet another knife-edged fact regarding the problematic conduct of his law firm colleague Slade Gorton:

Mr. Gorton goes with Mr. Ceis to the NBA to lay out their arena plan, Mr. Bennett is invited to that meeting, they sign a document where they agree that they are not going to tell anyone anything, because that might actually be the best moment for all the parties involved to cut a deal or to talk about what they can do to come to a solution. And Mr. Gorton, less than 24 hours later, sends an email to the Ballmer group, where they are talking—and he lays out name, rank and serial number, and they all talk about going out and

---

<sup>188</sup> *Id.* at 90:15.

<sup>189</sup> In the previously-cited post-trial interview, Keller Interview, *supra* note 93, Brad Keller advised that, in light of the near-certainty that judges will find each side's gravest vulnerability, lawyers must build their cases from that precise point.

getting a beer.<sup>190</sup>

The exceedingly fine line-drawing that Lawrence defended throughout the trial, even if only out of necessity, may not have required explanation in a firm that represents sophisticated entities in complex deals and disputes across multiple forums. Ultimately, however, it did not matter if Gorton's activities were permissible or not. This was not a bar disciplinary hearing governed by the law of ethics. It was a trial in which the behavior had tainted the entire case in the eyes of the judge. Eventually, Lawrence attempted to distance his client from Gorton,<sup>191</sup> a move that he could not have taken lightly, but even then he tried to build the case on cold logic. Saying "there is no evidence that links Mr. Gorton's actions to the city," he pointed out to the judge that the email that so troubled her "was not copied to the city, which if it was something done at the city's request you might expect."<sup>192</sup> Unsurprisingly, the "no cc" defense fared no better during the closing than the "carve-out" explanation had moments earlier.

It is hard to imagine a wholly satisfactory response to the judge's concern. Lawrence's candid admissions ("I cannot explain Mr. Gorton's action,"<sup>193</sup> and again, moments later, "I wish I could explain what Mr. Gorton's thinking was"<sup>194</sup>) merit some sympathy. This was certainly not what he had in mind when he began the trial with the now piercingly ironic line that the case was "about the city of Seattle's policy decision to specifically enforce their lease with the Seattle Supersonics."<sup>195</sup> In ways he certainly never hoped, the trial had been reduced to a judgment on the City's decision to sue, but with little regard for any underlying policy. The legalistic approach to the trial (e.g., carve-outs, no viability clause, no cc on the email) rendered the City's case especially vulnerable to this particular form of unraveling. Lawrence may have intended his persistence in the claim that the City and its allies had done "nothing wrongful" as a show of tenacity. To the judge, it probably looked a lot more like rigidity or sterility, signaled in the opening and infecting the entire case. The City failed to adjust its trial position even as the judge pushed harder and harder to find a solution to a problem for which she concluded that responsibility was dispersed, creativity necessary, and time running out.<sup>196</sup>

---

<sup>190</sup> Basketball Transcript, *supra* note 77, at 115:8-17.

<sup>191</sup> In fact, Lawrence stated that his firm would cease representing the city if the judge deemed it necessary. *Id.* at 116.

<sup>192</sup> *Id.* at 115-16.

<sup>193</sup> *Id.* at 115:18.

<sup>194</sup> *Id.* at 116:6-7.

<sup>195</sup> See *supra* text accompanying note 18.

<sup>196</sup> Although criticized by some in the media, the settlement reached while the judge's decision was pending was not unfavorable to the city. The owners agreed to pay \$45 mil-

### C. Lawyer in Stride, Judge Alongside

Brad Keller began his closing for the owners by inviting the court to see the trial as a dynamic process: “You sit here as a court of equity to decide *from the ground up* whether or not the remedy of specific performance is available under the facts of this case as we stand here now in 2008 *given all we learned*.”<sup>197</sup> The italicized phrases connote building, growth, and discovery. They present the trial as a process the judge should be proud to have been a part of, not simply a ratification of something which was obvious at the outset. Directing attention away from the adoption of the lease terms (thirteen years ago) and placing it back on the trial, Keller simultaneously emphasized the lease’s current economic inadequacy and stoked the judge’s displeasure at the machinations of Gorton and others.

Keller’s central closing theme—“Look, we need to be straightforward here”<sup>198</sup>—is simple yet surprisingly comprehensive. The “need to be straightforward” has been the undercurrent running through the case all the way back to his initial concession regarding the home-game provision of the lease. And, of course, the “need to be straightforward” requires the court to reject the City’s convoluted “carve-outs” and elaborate “forced bleeding” plots that have been revealed throughout the trial. The call to be straightforward has a legal dimension as well, one that presents the City’s request for specific performance as extreme:

Stop and think for a minute. Why is it that specific performance is considered so extraordinary? It is because money compensation is the currency of our judicial system. You don’t get to elect remedies. It is money compensation. That is our currency that we deal with here in this courthouse.<sup>199</sup>

Having pushed nostalgic sentiment aside, Keller asked the judge to listen to the cold fiscal heart beating inside the body of the civil justice system.<sup>200</sup> If, as he claimed in opening, contracts such as this one cre-

---

lion initially and \$30 million more in five years if the city had not obtained a new NBA team. The owners had offered \$26.5 million three months before the trial. In a press conference held after the closing arguments, Deputy Mayor Tim Ceis expressed his high regard for counsel’s work during the trial: “I just want to express my appreciation for the great work [of] Paul Lawrence over the course of this trial and also particularly, though, today in his closing.” Deputy Mayor Tim Ceis, Press Conference (June 26, 2008) (audio link available at [http://blog.seattletimes.nwsources.com/sonicstrial/2008/06/26/press\\_conference\\_audio.html](http://blog.seattletimes.nwsources.com/sonicstrial/2008/06/26/press_conference_audio.html)). This validation from his client encompassed the testimony of Sherman Alexie: “I thought it was particularly telling that the judge asked about the issue of sentimentality.” *Id.*; see *supra* text accompanying note 84.

<sup>197</sup> Basketball Transcript, *supra* note 77, at 120 (emphasis not in original).

<sup>198</sup> *Id.* at 124.

<sup>199</sup> *Id.* at 132:20-25.

<sup>200</sup> This “money only” theme marks a significant distinction between a lot of civil litiga-

ate marriages, each one comes with a default prenuptial agreement written into it.

Keller's push on the monetary value of a case plays powerfully off of the judge's repeated expressions of concern over the missed opportunities to settle. In fact, the judge responds to this claim of "money, only money" with a test of sorts. Referring to evidence in the record as to the owners' last settlement offer,<sup>201</sup> she suggests that it is not her place to tell the City what is best:

*Judge:* Is it up to me to tell the City leadership: "You're asking for a bad bargain"? That is not my role, is it?

*Keller:* No. . . . I will tell your Honor, since you raised that offer, that offer was put together designed based on exactly how much the financial payments would be under the lease to the City, and what the remaining construction debt obligation would be at the end of it.

*Judge:* That wasn't lost on me, Mr. Keller.<sup>202</sup>

The two of them, lawyer and judge, are perfectly in step here. Keller can return to his marriage metaphor, confident that the judge is following its logic. As the relationship (the marriage) between the City and the team was nearing dissolution (divorce), it was not necessary that there be ugly conflict. The breakdown, as Keller said in opening, was not the fault of either party, and it was still possible for them to reach an understanding based on "what does the other guy need, what

---

tion and criminal cases, such as the juvenile cases described in this Article. To the extent that monetary damages are the principal measure of a particular dispute, the possible results run along a continuous range. One side (and its lawyer) can claim a spot along that continuum where it would like to end up and then work to keep the judge as close to it as possible. In such circumstances, the trial takes on the aspect of mediation by costlier and riskier means.

<sup>201</sup> In the research conducted by Guthrie et al., judges did far worse in ignoring their knowledge of settlement offers than they did in ignoring unconstitutionally obtained evidence. Guthrie, *Judges Ignore*, *supra* note 9, at 1291-93.

<sup>202</sup> Basketball Transcript, *supra* note 77, at 127:13, 128:1. Contrast the exchange between Keller and the judge regarding the settlement amounts with that between Lawrence and the judge regarding some case law:

*Lawrence:* A case that is on point with this is *Triple-A Baseball Association v. Northeastern Baseball, Inc.*, out of the First Circuit, 1987 case. There the question was whether or not—

*Judge:* You don't need to tell me about that case. I told you about it.

*Lawrence:* I appreciate that. I wasn't sure if Your Honor wanted to reveal that was the case that you were asking about.

*Judge:* It obviously is the case.

*Id.* at 96:3-12. In each instance, counsel is telling the judge something she already knows. Lawrence comes off, in the judge's eyes, as clumsily playing to her intellectual ego. Keller, on the other hand, ends up showing a common mode of analysis. This is not intended to suggest any favoritism on the judge's part. Keller has staked out a position that resonates with the judge's problem-solving approach. Lawrence is grasping for purchase, trying to make the case into a simple legal technician's quiz. As demonstrated above, the judge kept having to pull Lawrence into the world as she saw it, where things were more complicated and motives more mixed than he was letting on.

is fair.”<sup>203</sup> However, the decision to take the case to trial has transformed the calculus. The revelation of the forced bleeding strategy is what a sports announcer might call “a game-changing event.” The parties cannot restore the conditions that made the more generous offer possible. Keller’s clients had, he claims, shown mercy and large-heartedness to their partners, but, having chosen to fight, the City leaders would be left now to get only what they deserve.<sup>204</sup> This line of argument keeps the judge focused on the present and the future. If the conditions immediately prior to trial cannot be re-created, certainly, the days of the signing of the lease are of, at most, archival interest.

The closing concludes with a maneuver that combines humor and pathos and reveals again how well-attuned Keller was to the judge’s sense of the case. Of course, it involves Slade Gorton. Keller links the City to Gorton’s activities in toto, arguing that the City and the prospective local ownership group “each in a coordinated manner, implemented the precise pincer strategy. . . . Each one doing what the other needed and publicly joining hands”<sup>205</sup> when it was advantageous or necessary to do so. He keeps the spotlight on the true bad actors, the lawyers, rather than the public officials with whom they worked. Keller marries words and image, saying: “And there is K&L Gates smack dab in the middle coordinating all of this,”<sup>206</sup> while presenting on the courtroom screen a slide showing an image of a human brain. One hemisphere is green, the other blue. One side is marked “City’s Litigation lawyers,” the other “Griffin Group’s Lawyers.”<sup>207</sup>

Here is Slade Gorton, the right side of his brain is working for the Griffin group’s lawyers, the left side is working for the City’s litigation lawyers. We are supposed to think the left side of the brain isn’t talking to the right, and vice versa.<sup>208</sup>

The implausibility of Gorton compartmentalizing his work on and thinking about this case sinks the City’s desperate claim that the two groups themselves were not in fact communicating:

You are being asked to accept that the City’s attorney wasn’t telling his client what he was cooking up when the two had the exact same objective, to keep the team here, and forcing the sale would have

---

<sup>203</sup> *Id.* at 128:4.

<sup>204</sup> *Id.* at 128:4-7. (“[The final pre-trial settlement offer] is different than what the setting will be if we have a contested proceeding later and we are talking about what are they actually entitled to.” The amount of the final settlement, *see supra* note 196, suggests that this was more rhetoric than reality.

<sup>205</sup> Basketball Transcript, *supra* note 77, at 138:6-7.

<sup>206</sup> *Id.* at 138:10-11.

<sup>207</sup> A copy of the slide is on file with the author.

<sup>208</sup> *Id.*



accomplished that objective for both. That is contrary to logic. That is contrary to common sense.<sup>209</sup>

Logic and common sense, the stock-in-trade of the “straightforward.” The slide is quite simple, rudimentary even, and, of course, scientifically incorrect.<sup>210</sup> Much conventional wisdom would deem such visual aids unnecessary and even dangerous in a bench trial, dismissing them as lawyer showmanship, if not showboating.<sup>211</sup> It is impossible to precisely gauge the slide’s impact on the judge’s thinking, but it did make her laugh.<sup>212</sup> Keller ends the case by inviting the judge to step forward as he steps aside: “Enough is enough. The marriage is broken. Please stop the bleeding.”<sup>213</sup> Keller’s time on the dance floor is up. He yields the floor and the spotlight to the judge. After a trial that has been about failures of different kinds, the judge is in position to perform an act of healing.

However amusing Judge Pechman found the slide and however gratifying it might have been to heal the wounds between the parties, it would be a mistake to interpret the pointedness and intensity of her challenges to counsel during closing as a clear indication of a likely ruling on the merits. Nevertheless, these interactions do contain lessons for bench trial lawyers. In the best of circumstances, bench trials offer lawyers something they will never have in a jury trial: the chance to participate in what is effectively an intermediate stage of deliberations. Admission to this stage of decision-making, the near-equivalent of a seat in the jury-room, comes at a price. Counsel must be ready to set aside the self-regard that characterizes many closings. Even at this late stage, it is not too late to refine a position. In fact, persuasion of a truly skeptical judge may require such an adjustment. Like “intermediate,” the term “refine” is carefully chosen. Closing is no time for a full-scale tear-down of a case theory. Optimally, the case theory presented in opening was chosen with the requisite flexibility to accommodate the inevitable knocking around that trial can do to a lawyer’s plans. But where a choice must be made, and often, as here, the judge will let counsel know, the closing must be true to the trial and

---

<sup>209</sup> *Id.*

<sup>210</sup> The graphic quality of the slide is strikingly similar to one Jeremiah Donovan used in the trial Meyer has written about, at least as reproduced in Meyer’s article. Meyer, *Desperate I*, *supra* note 24, at 748.

<sup>211</sup> *But see* Sharifi, *supra* note 117, at 693.

<sup>212</sup> Damon Agnos, *Best Friend of the Enemy*, SEATTLE WEEKLY, Aug. 6, 2008, at 68, available at <http://www.seattleweekly.com/bestof/2008/award/best-friend-of-the-enemy-477178> (“The graphic elicited laughter from Judge Marsha Pechman and pithily summarized Keller’s argument that Gorton and the city were guilty of double-dealing—professing good faith in their negotiations with the team while working behind the scenes to weaken its financial standing and arrange a sale to local owners.”).

<sup>213</sup> Basketball Transcript, *supra* note 77, at 158.

not the opening (delivered in trial but created prior to it). Making the right adjustments requires the ability to view one's case objectively, admit mistakes or failures as needed, and credit one's opponent when due. These capacities are likely equally effective in jury trials, but (1) the lack of good information as to jurors' views and (2) lawyer belief in the force of their persuasive powers, especially before laypeople, render them considerably more rare in such settings.

#### D. *Learning to Dance*

Defense counsel in the assault trial faced a difficult task in closing argument. The mother's sympathetic (if also unimpressive) appearance, the son's persuasive testimony, the dramatic power of the 911 recording, and the undeniable fact of the mother's injury combined to form a weighty case for the prosecution. Even with the benefit of hindsight and without the pressure of real-time decision-making, it is hard to see a clear path to acquittal. The narrative lawyering literature embraces such challenges, celebrating the possibilities for creative advocacy in difficult circumstances, but also recognizing that even exemplary lawyering may ultimately prove unsuccessful.

In his analysis of the closing argument attorney Gerry Spence delivered in the famous Silkwood trial,<sup>214</sup> Meyer shows Spence weaving together an array of narrative maneuvers, notwithstanding Spence's frequent disavowal of rhetorical finery as a means of persuasion.<sup>215</sup> Of most pertinence to bench trial lawyering, Meyer demonstrates how, before launching his more elaborate moves, Spence affirms his "ongoing dialogic relationship with the jurors."<sup>216</sup> He does this quite simply, by acknowledging the gravity of what they have been through together. With a directness that many lawyers would be hesitant to attempt, Spence grounds his closing in the shared experience of the trial: "I couldn't get over it—I couldn't sleep. I couldn't believe what I had heard. I don't know how it affected you."<sup>217</sup>

Like virtually every other lawyer to ever try a case, defense counsel in the assault case lacked Spence's self-assurance. She likewise did not have a client who could, even with the most liberal poetic license, be referred to as a prophet.<sup>218</sup> However, because the assault case was

---

<sup>214</sup> Meyer, *supra* note 184; see also PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT 425 (1989) (offering excerpts and instructive discussion of Spence's closing and that of his adversary, William Paul).

<sup>215</sup> See LAGARIAS, *supra* note 214, at 429 (quoting Spence, who says: "Communicating with people isn't simply playing back to them cute little techniques or manipulating them with funny little arguments that are clever and thought to be convincing").

<sup>216</sup> *Id.* at 251.

<sup>217</sup> *Id.* at 250.

<sup>218</sup> *Id.* at 254.

a bench trial, she had something Spence did not. She knew (or should have known) how the case had affected the judge. She had heard the judge make the rulings regarding the two recordings. She had been in the room when the recording of the mother was played. She had fought with the judge to complete the various impeachments of the mother. She had ample reason to conclude that he had not—and would not ever—come to see the mother as the aggressor. She thus had the opportunity (more accurately seen as the necessity) to attempt a very difficult, but potentially very powerful lawyering maneuver: acknowledging the tension within and then trying to re-direct and redefine her “dialogic relationship” with her audience. The judge’s ruling—in which he emphasized the testimony of the son<sup>219</sup> and used it whenever possible to bolster that of the mother—was consistent with the numerous mid-trial signals described above regarding the mother’s relative weakness as a witness. This implicit admission that he had been wrong about the mother at the start of the case, that she was not the character he had expected her to be, suggests one way counsel might have drawn the judge away from the rapid<sup>220</sup> guilty verdict he issued. Explicitly acknowledging her own changed appreciation of the mother, counsel might have used this common bond—the trial as learning experience—as a way of reconceiving the entire case.

Depicting the mother as a monster was simple—she was indisputably the first person to brandish an object—and almost certain to fail. Moreover, the attack on the mother kept the trial locked in the wrong emotional register. It was the mother who had written horror movie motifs (blood in the bathroom, victims wrapped in towels, familiar objects such as doors and hangers, transformed into implements of harm) into the trial. Counsel could have taken advantage of the judge’s desire to create a less hysterical, more sober environment in the courtroom. Doing so likely required some recognition of the 911 call and what it demonstrated about the mother’s experience of the incident as a trauma. Demonstrating sympathy for her, even praising her apparent intention to keep her children safe from harm,<sup>221</sup> counsel might have commanded the judge’s attention for long enough to be

---

<sup>219</sup> Domestic Disturbance, *supra* note 40, at Disk 2, 55:28-34 (“The testimony of the brother, in my view, is very convincing.”). Elsewhere, he finds the mother’s testimony, at least the part about being slashed with the hanger, merely “credible.” *Id.* at Disk 2, 54:18-23.

<sup>220</sup> Less than two full seconds pass between the last word of the prosecutor’s rebuttal closing and the first word of the judge’s ruling. *Id.* at Disk 2, 51:42-44.

<sup>221</sup> See Dana Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 29-31 (2001) (demonstrating how a cross-examination built around sympathy for a witness’s laudable motivations can be more devastating than conventional destructive approaches).

heard as she talked about the mother and daughter's joint need to learn how to communicate and otherwise handle the tribulations of adolescence. Thus fusing the lawyer-judge and mother-daughter units into a larger community of learners, counsel would create a way for the judge to envision the family as not in need of judicial intervention.<sup>222</sup> Their home is not a den of monsters, so permeated by ill-will that the only question is: "Who acted worse, the sullen teen or the frazzled mother?" Instead, it is, like most homes, a place where people misunderstand each other and make bad decisions, but can grow beyond their worst moments.

This line of advocacy requires counsel to be bold enough to concede error without for a second ceasing to advocate. If this case had been tried to a jury, counsel could have made a similar choice, but, because of the more limited feedback, it would likely have been more difficult for counsel to determine the fact-finder's assessment of the witnesses and events, thus making such an unconventional move even riskier. This is just one way in which the contrasts between the two settings force distinctions between the narrative structures of bench and jury trial closings. In the tight professional circle of a bench trial, with lawyers and judges sharing traditions and, yes, stories, lawyers must find a way to keep their advocacy fresh. Jury trial lawyers will often return in closing argument to a familiar trope, a story that, although they are telling it for the tenth time, is new to the audience.<sup>223</sup> Bench trials force lawyers to be creative, to craft an argument that is truly unique, a distillation of this case and the experience of trying it in a way that will never be duplicated.

No amount of lawyerly creativity on the part of defense counsel in the assault case could have conjured away the brother's incriminat-

---

<sup>222</sup> In this regard, the trial might have arrived at an inverse point from the moment in the Sonics trial when Judge Pechman wondered whether granting the city's request would necessarily ensnarl the court in a series of future squabbles between the parties. Counsel for the city needed to convince the judge she could act and then withdraw, leaving a peaceful relationship in place. Counsel for the defense in the assault case needed to show that no intervention whatever was needed.

<sup>223</sup> In the Silkwood trial, for example, Spence closed with what Meyer refers to as his "trademark formulary anecdote," the Bird Story, a parable about a "wise old man . . . and a smart-aleck young boy." Meyer, *supra* note 184, at 265. Famed Chicago lawyer Eugene Pincham regularly taught jurors to see the flaws in a prosecution by means of an analogy to a story from his childhood, in which his mother always knew when he and his brother had helped themselves to forbidden sugar because she would find "granules on the floor." JAMES W. McELHANEY, TRIAL NOTEBOOK 683-84 (4th ed. 2006). In fact, Pincham told this story so often that on at least one occasion, a prosecutor remarked to the judge during the moments before closing that they had better be ready to hear it again. Steve Neal, *Pincham Pursues Political Mission*, CHICAGO SUN-TIMES, Mar. 11, 1990, at 44. Legend has it that Pincham responded that he would indeed tell it again and would continue to do so until he stopped having success with it.

ing testimony. This young man, introduced as a lifeguard in his late teens, is trained, and seemingly naturally inclined, to protect, to handle emergencies calmly.<sup>224</sup> When the door falls on his sister, he calls for his mother and moves to his sister's aid even though the tantrum that brought the door down on her was apparently an indirect attack on him for using the phone. Some brothers in this situation might leave their sister to deal with the mess she made for herself; not this brother. When his mother is overwhelmed, unable to finish the call with the police, he takes over and ends up comforting her. With ample opportunity to observe and a character that renders him immune from any claim of intentional fabrication, he is a nearly invulnerable witness. His testimony did, however, present one apparent flaw. He denied that the mother had committed any aggressive acts, even those that she herself had admitted. He testified that she had neither brandished the hanger<sup>225</sup> nor ordered him to subdue his sister with wrestling moves.<sup>226</sup> The mother readily admitted both of these acts,<sup>227</sup> and

---

<sup>224</sup> Miller offers another example of how employment or role can serve as a valuable schema, communicating something about who a person is from what he routinely and consistently does. Faced with allegations that her client provoked and escalated a dispute with store security and police officers, she describes a case theory option that built upon the helpful associations jurors might have with the client's occupation of janitor: "A janitor mops floors and cleans up other people's messes. . . . A janitor does not challenge authority unless he is pushed to the wall." Miller, *supra* note 109, at 550.

<sup>225</sup> Defense counsel explored this subject from several angles, giving the young man numerous chances to acknowledge at least the possibility that the mother did at some point possess the hanger:

*Counsel:* Did you ever see your mom have a hanger in her hand?

*Witness:* No.

*Counsel:* Did you ever see your mom trying to . . . defend herself from Michelle's feet with the hanger?

*Witness:* No.

*Counsel:* Did your mom ever have the hanger in her hand?

*Witness:* No.

*Counsel:* As far as you know, this hanger was always in Michelle's room?

*Witness:* Yes.

*Counsel:* And she was the only one that touched it?

*Witness:* Yes.

*Counsel:* And she's the one who picked it up and broke it in half?

*Witness:* Yes.

Domestic Disturbance, *supra* note 40, at Disk 2, 11:15-30.

<sup>226</sup> *Id.* at Disk 2, 11:45-50.

<sup>227</sup> *Hanger:* The mother testified on more than one occasion that she had picked up a hanger and was poking at her daughter with it. She described with something approaching awe the brute force with which the daughter had wrested the hanger from her hands. *Id.* at Disk 2, 26:24-39.

*Wrestling:*

*Counsel:* Did you, uhm, you actually asked Steven to do a wrestling move on her?

*Witness:* Yeah.

*Counsel:* You asked him to pin her down?

*Witness:* This is after the door had hit the ground.

there is little reason to doubt her.

Why would the brother have the specific memory failures he did? As with the mother, counsel's best chances for success in closing lay in exploiting the brother's strength, not his weakness. His protective instinct runs strong from the time of the incident all the way through the trial. His memory of the event obscures his mother's complicity, the way she contributed to the escalation that so unhinged her. He is unconsciously protecting her from embarrassment. He is also protecting the entire family, including himself. Discussing this incident must be quite embarrassing for a teenager, even a mature one. A certain amount of the family's dirty laundry must be revealed, as the case is before the court and it would be wrong to suggest that nothing had happened. But who wants to be seen as the son of a hanger-wielding wrestling-coach of a mom? His tone on the stand suggests no glee in his sister's predicament, and his unconscious shading of the facts is healthy, a sign that the family is viable. The flaws in the brother's testimony might not add up to reasonable doubt, and they certainly do not obscure the fact of the mother's bloody elbow. This should not be surprising or overly disappointing. Narrative lawyering is not the production of fiction. It is an attempt to present a case in a manner that resonates with the fact-finder's lived experience, that which he brings to the trial and that which he experiences during the trial. What should be clear is that counsel's only hope of inducing even a brief suspension of judgment lay in a narrative strategy that treated the family as a complex entity, as all families are.

## V. BUILDING BETTER BENCH TRIALS

Having examined the distinctive challenges that bench trials present to lawyers, this Article will now look briefly at some ways of improving the often intense and unusually loaded communication that takes place within such trials. The first set of suggestions addresses procedural reforms that can eliminate some of the unnecessary friction within bench trials. The second set calls for changes to lawyer practice and self-concept that accommodate the way bench trials work, as has been described so far.

### A. *Procedural Reform*

This Article has demonstrated how judges frequently communicate their views during bench trials. Sometimes intentionally, often indirectly, but always meaningfully, judges speak and act in ways that reveal their developing understanding of and reaction to the evidence

and arguments. The procedural reforms suggested here are intended to normalize additional opportunities for communication between judges and lawyers so that the process as a whole is more effective and more just.

1. *Measuring Judges Before and After Trial: Voir Dire and Record-keeping*

As discussed in Part III, judges, like jurors, bring preconceptions into any trial. Unlike jurors, judges are not subject to voir dire before the trial begins. As described by Amsterdam et al., voir dire does more than merely allow lawyers to learn about and select<sup>228</sup> those who will decide their case. The procedure enables lawyers to educate jurors about the case and about the limits of what they think they already know.<sup>229</sup> Surfacing details about the jurors' backgrounds, lawyers are also able to get jurors' commitment to attempt to set aside impermissible or extraneous factors. In closing argument, they can and often do remind the jurors of this commitment and, if necessary, explicitly point to the ways those dangerous influences might sneak into their thinking if they are not vigilant.

Many judges would likely be offended by the suggestion,<sup>230</sup> but there are good reasons to ask them to engage in a similar process of surfacing experiences and views prior to trial. Research into judge's cognitive processes reveals the gap between actual and idealized judicial decision making. Merely being asked a few pertinent questions might prompt self-awareness that routine practice buries. It is common for jurors to be asked if they have ever served on a jury before. If so, they are asked about that experience, its similarity, if any, to the instant case, and what lessons they learned from having served. Jurors in criminal cases are routinely asked if they know people who work in

---

<sup>228</sup> Lawyers have limited tools for affecting the assignment of a judge to their case. Lawyers can move for recusal, but, in part because the decision is committed to the judge whose fitness to try the case would be questioned, lawyers rarely do so. Some jurisdictions permit lawyers to request a new judge merely by filing an affidavit alleging prejudice (somewhat akin to a peremptory strike of a juror), see WASH. REV. CODE § 4.12.050 (2008), but lawyers must then accept whatever judge is next assigned to the case.

<sup>229</sup> See Alper, *supra* note 4, at 62 ("Voir dire played a key part in instructing prospective jurors to accept skepticism as a proper starting point for performance of their fact-finding responsibility."); see also *id.* at 67 ("[T]he prospective jurors had to be taught not simply to be skeptical of their previous impressions regarding the facts, but to be skeptical specifically of the videotape, the centerpiece of the prosecution's case.").

<sup>230</sup> See Peter David Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 IND. L.J. 1119, 1122-23 (1993) ("Most trial judges, however, receive little feedback about their courtroom communication, and what little they do receive is mostly anecdotal. This may be in part because there are few standardized methods through which such feedback may be provided, judges are reluctant to receive such feedback, or judges lack effective techniques for monitoring the impact of their courtroom behavior.").

law enforcement and how such relationships might affect their assessment of witness credibility. Juvenile court judges might profitably be asked, "Can you recall the last time you made a finding of fact that a police officer lied or testified with less than full candor?" or "How many alleged child-on-parent assault cases have you presided over? In how many of those cases was self-defense claimed? Have you ever acquitted a respondent in such circumstances?"

In the face of (and even in the absence of) such a procedure, conscientious judges might begin to track their trial decision-making along these lines. Better yet, a court system committed to accountability might impose such a system on its judges. Compiling this aggregate data might tell a judge something she has been unable to see.<sup>231</sup> The memory of the most recent acquittal will likely leave a long-lasting impression that will obscure the fact that it occurred several years ago, an example of what social scientists refer to as the availability heuristic.<sup>232</sup> Appellate judges (and federal trial judges) are subject to a substantial degree of review of this kind by virtue of the fact that their opinions are published. State court trial judges, by contrast, are largely immune. Individual decisions may come to light when connected to a high-profile, and especially a notorious, case, but patterns are almost certain to remain hidden from all, the public, the lawyers, and even the judges themselves.

In the absence of regular processes for generating information about trial judges' decisions, parties wind up dependent upon the quality of the informal information networks upon which their lawyers rely. These are as susceptible to the availability heuristic and other forms of fallacious reasoning as is a judge's individual memory. It is common today for counsel to send an email to various listserves asking for a judge's take on whatever issues counsel anticipates arising during trial. Technology thus enables counsel to draw on a wider range of experience than in the past, but, as with the judges themselves, lawyers will be prone to remembering the most emotionally

---

<sup>231</sup> See Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1 (2006) (proposing practices of judicial mindfulness as a means of overcoming "[t]he lack of a self-checking mechanism" on judicial bias). Seamone's approach is entirely judge-focused. It seeks to improve judges' appreciation for the situation of other actors, but it does not create opportunities for those actors to themselves become aware of or play a role in shaping the judge's thinking.

<sup>232</sup> See Cass Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. REV. 1295, 1297 (2003) ("Lacking statistical information, people substitute an easy question (Can I think of illustrations?) for a hard question (What realities do the data actually show?)") (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 46-49 (Hal R. Arkes & Kenneth R. Hammond eds., 1986)).



charged, rather than the most common, incidents. It would certainly be possible for a bar group, a defender agency, or a prosecutor's office to engage in more systematic record-keeping about judicial practices, but resource constraints and the force of habit will likely make this a rare development. The infrequency of appeals in the juvenile and misdemeanor cases that make up such a considerable component of the bench trial dockets means that electronic databases such as Westlaw and Lexis will provide only episodic data, such as the case recalled so strongly by the judge in the Safeway trial.<sup>233</sup>

The second reform proposal also seeks to improve the quality of information-sharing that occurs within bench trials, this time by advancing in time and increasing the frequency of the opportunity for lawyers to make clear to the court the significance of the accumulating evidence. Guggenheim and Hertz point out that "the common jury trial strategy of eliciting apparently insignificant concessions upon cross-examination and weaving them together in closing argument may be counterproductive in a bench trial."<sup>234</sup> They trace this danger to the fact that "many judges make up their minds about the verdict before hearing closing argument" and thus may rule without ever fully appreciating "the actual significance of a cross-examination."<sup>235</sup> While some judges might resist the suggestion that their minds are "made up" by the time of closing, each of the three judges described in this Article revealed a fairly firmly-held view on at least one pivotal issue before (and sometimes well before) the lawyers closed.

Guggenheim and Hertz advise lawyers to "surface the implications"<sup>236</sup> of their examinations so that the judge appreciates and considers them before it is too late. This advice comes with the caveat that lawyers do so without providing the witness or opposing attorney the chance to detract from the examination's effectiveness. Threading this needle between clarity and indirection is a formidable task. Consider one hypothetical example offered by Amsterdam et al. in the jury trial context. They imagine "a prosecutor in a strangulation-murder case us[ing] language in examining witnesses and arguing to the jury which successfully evokes a juror's recollection of the automobile garroting episode near the end of *The Godfather I*."<sup>237</sup> It might be possible to plant some language in an examination which is then drawn out in closing for this effect, although even this would be hard

---

<sup>233</sup> Experience in nearly two decades of juvenile court practice has shown that even a measure such as running a Westlaw search to review a judge's opinions is rare.

<sup>234</sup> Guggenheim, *supra* note 8, at 591.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Alper, *supra* note 4, at 15.

to do in a way that was not unduly inflammatory. It is hard to imagine how one could do it on the examination alone. The rules governing cross examination are designed to keep lawyers and witnesses tied to the facts rather than their explicating their meaning. Pushing too hard to “surface the implications” of an examination will produce successful objections that the lawyer is being argumentative. The best lawyers can find this narrow pinpoint of balance, but justice demands that parties whose lawyers have not attained this level of mastery also have their cases fully heard.

One way of addressing this would be to adapt another practice from jury trials: the interim summation. Often, in lengthy or complex civil trials, judges will allow counsel the opportunity to argue the significance of the evidence to jurors before all of the evidence is in.<sup>238</sup> If a jury hears a highly technical examination of an expert early in a tort trial, the substance of the witness’s data and opinions are likely to wash away if the jurors must wait three weeks before hearing from counsel about how to make sense of them. During an interim summation, lawyers are permitted to argue the evidence at the close of (and sometimes even during) an examination. The problem identified here with respect to bench trials is not the same as the limits on juror memory or understanding, but the cure seems equally effective. Recall the mid-impeachment query of the judge in the domestic assault case, “Counsel, I’m wondering what difference it makes.”<sup>239</sup> Interim summation would allow counsel to address such concerns even when the judge does not share them so frankly. Allowing such summations, with judicial questioning during them, would normalize the process of feedback and adjustment that takes place in bench trials already but currently in an ad hoc fashion. These two proposals share the feature that each would open up the thinking processes of the actors. Hidden beliefs and masked agendas would be replaced by a more direct engagement, one that seems better suited to resolving a dispute that has been committed to members of a common order.

### *B. New Moves for Trial Lawyers*

#### *1. Re-considering the Impact of Pretrial Motions in Criminal and Juvenile Bench Trials*

Neither lawyer in the Safeway trial made an opening statement. Such waivers are common in many juvenile courts,<sup>240</sup> presumably due

---

<sup>238</sup> Robin Cauthron, *What Trial Judges Would Like To Say to Trial Judges*, 31 N.M. L. REV. 241 (2001); Susan J. Macpherson, *Tools To Keep Jurors Engaged*, 44 MAR. TRIAL 32 (2008).

<sup>239</sup> See *supra* text accompanying note 152.

<sup>240</sup> See RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY AMSTERDAM, TRIAL MAN-

to the widely-held belief that narrative sophistication, and even advocacy, is wasted in bench trials. Decrying this lamentable and slowly-eroding tradition is beyond the scope of this Article. However, the procedural history that preceded the waivers in the Safeway trial is highly instructive with respect to dangers faced by committed lawyers<sup>241</sup> who approach bench trials with the seriousness they deserve but mistakenly believe this obligates them to litigate bench trial cases in every respect as if a jury was going to decide them. The waivers in the Safeway trial reflected little tactical consideration,<sup>242</sup> but because they immediately followed a pretrial suppression hearing, they sharply illustrate this common dilemma.<sup>243</sup>

Because suppression litigation in criminal and juvenile cases often takes place on the day (or eve) of trial and before the trial judge, whether and how lawyers litigate such motions may have as dramatic an impact on the judge as opening statements do in a jury trial. Pre-trial litigation detached from a well-founded theory of impression formation does not merely delay but may actually compromise counsel's chance to shape the judge's initial impression by means of a compelling opening. Judges' ability to ignore incriminating evidence which they have ordered suppressed has received considerable attention in the literature, with unsurprisingly inconclusive results.<sup>244</sup> Because

---

UAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 580 (2d ed. 2008) ("In many jurisdictions it is customary for both sides to waive opening statement in a bench trial.").

<sup>241</sup> For an exploration of how good lawyers, with a demonstrated commitment to their clients and their craft, can nevertheless wind up trapped by seemingly benign aspects of their practice environment, see Doyle, *supra* note 63, at 419 ("[F]ascination with the shortcomings of *bad* lawyers obscures a deeper issue. What do *good* lawyers do when they 'represent' a death penalty client?") (emphasis in original).

<sup>242</sup> At the start of the trial-in-chief, the prosecutor asked the judge if he would like counsel to make opening statements. The judge replied, "If you feel the need to make an opening statement, you may do so." Detecting that the judge did not strongly "feel the need" to hear openings, the prosecutor suggested a brief one, but then waived altogether after the judge pointed out that the witness, still on the stand from the motion hearing, would need to leave the courtroom pursuant to the Rule on Witnesses. Safeway Theft, *supra* note 37, at Disk 1, 56:21-50. The prosecutor appeared to be trying, albeit clumsily, to both present his case completely and remain engaged with his audience. Defense counsel waived opening without comment or strain, *see id.* at Disk 1, 56:55, true to the ineffectual nature described above, *see supra* note 120.

<sup>243</sup> *See* Alper, *supra* note 4, at 119 ("Recent legal scholarship on story-telling in litigation thus suggests the extent to which an advocate's decisions about most basic aspects of trial conduct—pretrial maneuvers, opening and closing statements, presentation of evidence, and even behavior in the courtroom—implement strategic judgments about the nature of the story s/he will communicate to the fact-finder.").

<sup>244</sup> Compare Guggenheim, *supra* note 8, at 573 ("[I]t strains the imagination to believe that a judge would not be affected by knowledge of a confession, if only at an unconscious level."), with Guthrie, *Judges Ignore*, *supra* note 9, at 1322 (discussing experimental research showing that although, as a general matter, "suppressing the influence of information that is supposed to be ignored will be difficult," judges evaluated experimentally were apparently able to ignore confessions or unconstitutionally obtained physical evidence).

suppression motions are granted quite infrequently, however, lawyers need to pay greater attention to the impact of unsuccessful suppression claims.

In the course of their research into judicial cognition, Wistrich, Guthrie, and Rachlinski, affirm “the dramatic effect of first impressions.”<sup>245</sup> In making this point, they refer to a landmark psychological study in which subjects were read a set of six adjectives: intelligent, industrious, impulsive, critical, stubborn, envious.<sup>246</sup> One group heard the words in the above order; the second group heard the same words, but in reverse order. The group that heard the desirable characteristics (intelligent and industrious) first developed more favorable impressions of the hypothetical person being described than did those in the other group. The same negative traits which, when heard first, created an image of a “problem” personality, were viewed, in the first condition, as mere shortcomings which did not outweigh the individual’s merits.

The Safeway case provides a useful platform for considering the implications of this psychological insight (and the broader subject of the power of first impressions) for bench trial defense lawyers choosing between litigating a colorable but not compelling suppression motion or electing to move directly to openings.<sup>247</sup> The lead police officer testified that even after developing fairly strong evidence implicating the respondent, he did not arrest the youth but instead merely invited him to the police station. As the officer described it, “I had good reason to believe that he was the person that ran from me but giving him the benefit of the doubt, instead of making an arrest and not being 100% sure, I asked for his cooperation in the investiga-

---

Guthrie et al. acknowledge:

[These results] raise . . . serious questions about the applicability of our results to the real world. It might be easy enough in hypothetical assessments to assert that an important constitutional principle would prevent one from convicting a defendant. Exonerating a real, live defendant that a judge knows to be guilty might be a more serious matter.

*Id.* at 1322. This speculation comports with the experience of this Article’s author as a clinical teacher. For several semesters, students in the Seattle University Youth Advocacy Clinic have participated in a mock confession suppression hearing using the materials found in Diane Geraghty, Thomas F. Geraghty & Angela Vigil, *In re Pena: Representing Children and Families in Juvenile Court*, in *IN RE PENA: REPRESENTING CHILDREN AND FAMILIES IN JUVENILE COURT* (2002). Despite ample evidence in the record supporting the state’s case—evidence that this author suspects would regularly doom defense motions in real life—no judge has (mock) ordered that the statement of this hypothetical thirteen-year-old girl be admitted.

<sup>245</sup> See Guthrie, *Judges Ignore*, *supra* note 9, at 1266.

<sup>246</sup> *Id.*

<sup>247</sup> This dilemma does not exist in a jury trial for the simple reason that jurors are not present for the pretrial litigation.

tion.”<sup>248</sup> Shortly after arriving at the station and after being told he was free to leave, the respondent admitted involvement in the incident. Advised of his *Miranda* rights, he made a more complete and more incriminating statement. The judge reasonably found the police had engaged in “by the book, police constitutional process”<sup>249</sup> and admitted the statement.

Understood in light of the adjective study, this pretrial litigation did more than merely establish the admissibility of the statement. It cloaked the state’s case, which had its genesis in this investigation and interrogation, in an aura of legitimacy.<sup>250</sup> This would prove to be important, because the rest of the evidence did not go in smoothly for the state. Neither of its eyewitnesses identified the respondent as the second youth present at the incident nor offered any testimony directly implicating that youth in the assault. The judge’s finding of guilt of the lesser offense of Assault in the Third Degree suggests a close parallel to the adjective study, with the strong first impression (“by the book, police constitutional process”) lapsing slightly with the clumsy and underwhelming later proof.

Had there been no pretrial hearing on the statement,<sup>251</sup> the judge’s first encounter with the facts would have come in the opening statements. In such an opening, the state would certainly have mentioned the respondent’s admission prominently.<sup>252</sup> The fact that the defense had conceded the statement’s admissibility would certainly signal to the judge that the police had done things the right way. However, several things would likely have happened to improve the

---

<sup>248</sup> Safeway Theft, *supra* note 37, at Disk 1, 25:15.

<sup>249</sup> *Id.* at Disk 1, 54:50.

<sup>250</sup> Consistent with the culture of practice in this court, the witnesses at the suppression hearings did not reveal the contents of the statement before the judge had ruled (as doing so would cause unnecessary taint if the statements are suppressed). Thus, the judge did not know what it was that the respondent had said.

<sup>251</sup> WASH. JUV. CT. R. 3.5 (2009) (paralleling the rule in criminal cases) requires the court to hold a hearing whenever a statement of the accused is to be offered in evidence. Thus, lawyers in Washington arrive at this decision from a somewhat different rhetorical position than their counterparts in jurisdictions where a hearing will be held only if the defense takes the affirmative step of filing a motion.

<sup>252</sup> Even so, “[t]he defense is better off, however, having only to deal with the mention of the evidence in the opening, rather than having the judge hear it first in motions and then again in opening.” Sharifi, *supra* note 117, at 692 n.13. Recognizing the impact of primacy and repetition also has implications for the practice of having courts adopt pretrial motion testimony for purposes of trial. Some able and dedicated defenders resist this practice as a matter of principle, ostensibly to honor the client’s right to put the state to its full proof and exploit the possibility that a witness’s testimony will vary between the two iterations of it. The short interval makes this unlikely. The judicial disinclination to place much weight on inconsistencies, *see supra* text accompanying note 147, makes this generally unprofitable and, because it results in the repetition of harmful testimony, often counterproductive.

standing of the defense case as compared to the trial-after-suppression-hearing alternative. One, the judge would not have seen the officer yet and come to his own conclusion about his performance; two, the defense would have had the opportunity, during its opening, to direct the court toward its chosen issues; and three, by choosing its battles, the defense would have communicated the intention to reserve its fire for the critical points, as Brad Keller did in the Sonics' trial. With the opening statements in the hypothetical reconfigured Safeway trial completed, the state would likely not have called the officer to the stand first. Because the case was ultimately about what happened at the Safeway, the two Safeway witnesses, the manager and the security guard/victim would likely have testified first.<sup>253</sup> With their testimony coming in as unimpressively as it did in the actual trial, the state's case would have been an underwhelming mess of unanswered questions at this point. The officers' testimony would likely have filled in the crucial gaps somewhat, but, "given the dramatic effect of first impressions," it seems at least possible that the unfavorable first impression, tweaked in a positive direction toward the end, might leave the state struggling to hold on to any conviction at all rather than merely falling short of its top charge.

The significance of the decision to contest suppression or proceed directly to opening is greater in cases in which the statement of the accused is not completely incriminating on its face. Imagine that instead of saying, "I hit the security guard," the respondent had said "I went over to help my friend." This might provide enough evidence to circumstantially establish the respondent's involvement in the attack. However, the correctness of the police work would likely have less of a rescue effect for the state's case when what it produced was so much less conclusive. A defense argument based on reasonable doubt would stand a much better chance against such a background.

The suggestion to refrain from filing motions with low chances of success and significant prospects for blowback may seem obvious, but it is not made lightly. Even forty-plus years after the United States Supreme Court's decision in *In re Gault*,<sup>254</sup> the juvenile courts of the United States are not beset with an overabundance of suppression motions. In fact, through its surveys of practice in many states, the

---

<sup>253</sup> To the extent that this speculative analysis has merit, a prosecutor who thought in this way could (and should) make the unconventional move and call the police first. Years of observation in juvenile courts in many jurisdictions has shown few examples of such careful thinking about the order of witnesses. Judges are seen as bookkeepers and testimony as lacking any sequential dimension. To the extent the decision reflects much thinking at all, it is usually governed by concern for excusing non-police witnesses as soon as possible.

<sup>254</sup> 387 U.S. 1 (1967).

National Juvenile Defender Center has identified the failure to file viable suppression motions as a major concern.<sup>255</sup> Nevertheless, effective defense should mean the right motions, not simply more motions. In a criminal case in which the fact-finder, i.e., the jury, plays no role in the pretrial proceedings, defense counsel runs no risk of creating any adverse first impressions when litigating any colorable suppression claim. The fact that good criminal defense lawyers would file the motion in an identical criminal case is, at best, a starting point for a juvenile defender's strategy. Treating juvenile defense as a "lesser included practice" of criminal defense provides far more protection for the rights of youth than the historical defender reticence which has long resulted from concern for the youth's best interests. However, lawyers ill-serve their clients when they ignore essential characteristics of the tribunal. It may seem safer and at the same time truer to the defender's appropriate self-image as the client's champion to choose the course that involves action, such as filing a motion, than to tactically refrain, but the wisdom to so refrain is one of the hallmarks of professional expertise.<sup>256</sup>

## 2. *Appreciating Mediation*

The discussion of the closings in the Sonics trial highlighted instances when the trial seemed almost like a mediation, with the judge speaking through the forms inherent in a trial but communicating a message about the appropriateness of settlement. In various ways, bench trials, including criminal cases, collapse the traditional gaps<sup>257</sup> between mediation and litigation (and the narrative structures they enact),<sup>258</sup> making skills prized by mediators of particular use to liti-

---

<sup>255</sup> See, e.g., THE AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 26 (2002). Similar assessments from other states can be found at <http://www.njdc.info/assessments.php>.

<sup>256</sup> See Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 322 (1995); see also Leipold, *supra* note 2, at 218-19 (exploring the psychological barriers to waiving jury trials even when judges are demonstrably more prone to acquit, and stating that "[g]oing to trial is risky enough, and the preference for juries ingrained enough, that most lawyers are undoubtedly reluctant to waive a jury without a very good reason, one that can be articulated and later defended to co-workers, supervisors, and the defendant").

<sup>257</sup> The culture of criminal practice has generally devalued dispute resolution skills other than litigation fierceness and excellence. See Cait Clarke & James Neuhard, "From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 17 (2004) ("However, while mediation, arbitration, and the art of settlement are taught and extolled on the civil side, similar skills are not only not taught, they are frequently demeaned in many traditional criminal defense circles.").

<sup>258</sup> Robert Robinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLIN. L. REV. 833, 834 (2004) (referring to the traditional notion of

gators in this context. In his comparison of the narrative patterns common to litigation and mediation, Robert Robinson observes that many forms of mediation do not “presume that one ‘story’ has an exclusive claim to the truth”<sup>259</sup> and that mediation embraces the notion that perceptions can be unstable.<sup>260</sup> As we have seen, flexibility and open-mindedness, even comfort with indeterminacy, are traits that have greater value in bench trials than jury trials. Robinson also notes that “mediators decline the role of hero.”<sup>261</sup> Brad Keller’s closing in the Sonics trial reflected an anti-heroic sentiment. He critiqued the sentimental and grand vision of a resurrected franchise and re-energized fan base that he detected implicit in the City’s case. His call to “stop the bleeding” was a request for a measured intervention, and one which the judge seemed inclined to grant. The alternative closing explored here for the assault case likewise scaled back ambition for both the lawyer and the judge. Of course, the approach of the Safeway judge reflected the classical heroic motif that Robinson uses for his contrast. The point here is not to suggest that bench trials are always radically different from jury trials. Instead, they require lawyers to draw upon a broader range and finer assortment of skills and approaches.

Mediation places a premium on listening skills. In a book section headed “Persuasion Through Effective Listening,” John Cooley exhorts that “[l]istening with your mind fully engaged and your complete attention directed toward the speaker can be more powerful than the spoken word.”<sup>262</sup> Whether serving as a mediator or an advocate in mediation, lawyers learn to communicate via silence. Trial lawyers stand to benefit greatly from an enhanced capacity to appreciate in full what their opponent, and, even more important, the judge is saying. Trial lawyers generally receive little training on attending to non-verbal communication.<sup>263</sup> Leonard Riskin describes the depth required for achieving the desired perspective in mediation by writing that mediators must be able to “experience both sides of a controversy.”<sup>264</sup> Riskin’s use of the word “experience” is highly significant. “Experiencing” encompasses more than merely understanding, as it includes a sense of empathy for the opposed positions, a deeper form of listening and feeling. For lawyers in a bench trial, this empathy

---

litigation, observes that “[m]ediation creates and resolves disputes in ways that are utterly alien to the norms of advocacy”).

<sup>259</sup> *Id.* at 835.

<sup>260</sup> *Id.* at 857-58.

<sup>261</sup> *Id.* at 855.

<sup>262</sup> JOHN COOLEY, *MEDIATION ADVOCACY* 169 (2d ed. 2002).

<sup>263</sup> For one of these rare examples, see Dana Cole, *supra* note 221.

<sup>264</sup> See Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 58 (1982).



would need to encompass the opponent and the judge. Any good trial lawyer identifies an opponent's strongest arguments and prepares to neutralize them. Typically, this is done through force of logic and other rhetorical attacks. Precisely because judges are trained in the same habits of logic and can see through many rhetorical attacks, bench trial lawyers need to dig deeper and expose themselves a bit more. As the discussions of the Sonics and assault trials revealed, candid acknowledgment of the strength of an opponent's position will often engender a greater receptivity from the court than will a full-bore attack that minimizes the weaknesses of one's own case or mischaracterizes those of one's opponent. Rather than reflecting vulnerability, as many may fear, such a posture is likely to create an impression of wisdom and judgment that imbues one's arguments with enhanced persuasiveness. This is not a call to import into all bench trials the lax model of representation that has regrettably characterized America's juvenile courts for so many years. Instead, it is a recommendation to fight smarter, not louder.<sup>265</sup> Of course, a trial is not a mediation. There is little room within trial procedure for the sort of reflection, either vocal or silent, that mediators routinely do. However, training trial lawyers to develop the ability to hear other voices (and to hear themselves as others do) would enable them to make adjustments that may prove especially valuable in bench trials.

Analogizing mediation to jazz improvisation, John Cooley quotes a music scholar describing how "[p]erformers and listeners form a communication loop in which the actions of each continuously affect the other."<sup>266</sup> This notion of a communication loop, running ceaselessly, is a useful image for re-thinking lawyer's approach to bench trials. The double-source of this notion is quite useful for expanding or recasting the ideal of what makes trial lawyers effective. Lawyers will rarely, if ever, have the freedom to explore the possibilities of a particular performance in the way that jazz musicians do, but bench trials do present opportunities for creative, even improvisatory, adjustments. The Sonics case demonstrates the potential benefit to a lawyer of acknowledging weaknesses that the lawyer is aware of at the start of a trial. Doing so earns the lawyer credibility and attention. Lawyers stand to benefit equally from choosing the more daunting task of making course corrections to address weaknesses that become

---

<sup>265</sup> Given the cultural prominence of the gladiator model of trial lawyering, lawyers exploring this alternative approach should consult with clients and explain the expected benefits of it.

<sup>266</sup> John Cooley, *Mediation, Improvisation, and All That Jazz*, 2007 J. DISP. RESOL. 325, 331 (2007) (quoting Paul F. Berliner, *THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION* 459 (1994)).

apparent while the trial is underway. A judge is far more likely than a jury to welcome, let alone tolerate, counsel's adjustment of an earlier position because the judge understands that cases are to be decided on evidence and law, not on advocates' positions. Obviously, a lawyer should prepare thoroughly and thoughtfully so as to minimize the need for such adjustments, but, as the cases described above show, there is little profit in holding firm to a losing position. Moreover, for as long as such acts of re-direction remain rare, those that are well-chosen are likely to make a considerable positive impact. To achieve that proper tone, lawyers need to appreciate that improvisation is not about doing just anything in the moment, it is about following one's instincts in light of preparation and deep attention to the activity one is engaged in, including others' contributions to it.

### CONCLUSION

This Article has examined a generally neglected genre of lawyer performance—the bench trial—through the lens of narrative lawyering theory. This analysis has revealed that the difference between bench trial mastery and misadventure is often rooted in the way lawyers manage two characteristics of bench trials: immediacy and intimacy. The pressure of immediacy arises from judges' familiarity with the trial process and lawyer practice. Driven by a desire for efficiency as well as inescapable human cognitive dependence upon heuristics, judges move swiftly to assess cases and will not always see what may lie beneath the surface of a seemingly simple or familiar pattern. Lawyers must move equally quickly, yet thoughtfully, before the judge forms adverse—and often irreversible—conclusions about the case.<sup>267</sup> Often, the ultimate goal of persuasion can be achieved only after success at the preliminary task of inducing a pause, creating the space in which the variances between the judge's expectations and the story the lawyer wishes to tell can be set forth.

It may seem oxymoronic to speak of the intimacy of bench trials. Conventional wisdom deems them prosaic, boring; the term “bench trial” connotes flatness and impersonality. This view fails to appreciate the often intricate challenges lawyers face in responding to judicial involvement in the trial. Whether measured (as in the *Sonics* trial),

---

<sup>267</sup> Seeing a model for mediators in jazz improvisation, John Cooley has located great value in a performer's ability to move quickly to convey command and substance. See Cooley, *supra* note 266, at 328 (“[T]he quality of the performance depends on the depth and flexibility of the hierarchy and upon the performer's ability to exploit the hierarchy quickly.”) (quoting ROBERT JOURDAIN, *MUSIC, THE BRAIN, AND ECSTASY: HOW MUSIC CAPTURES OUR IMAGINATION* 174 (1997) (comparing jazz improvisation and everyday conversation)).

rampant (as in the Safeway trial), or conflictual (as in the domestic assault trial), such involvement collapses the distance between lawyer and factfinder. These close encounters are pivotal moments, and lawyers must approach them with a set of advocacy skills as comprehensive as, but often more refined than, those needed before a jury. Above all, the lawyer's trial plan, and especially mid-trial adjustments to it, must reflect a considered assessment of where the judge is, not merely a hopeful projection of where the lawyer wants her to be (or where she thinks a jury would be).

The closeness, or intimacy, of bench trials has a familial sense as well. Members of the same profession, judges and lawyers share a vocabulary, a code of ethics, certain formative experiences (such as law school and the bar exam) and a responsibility for justice. Judges may view experienced lawyers as peers entitled to respect. Less experienced lawyers represent the future of the profession and may appear as charges in need of guidance and example. The ongoing nature of the relationship creates a set of obligations and expectations that are necessarily distinct from the one-time and more distant relationship between lawyers and jurors. This common ground layers every move between lawyers and judges with extra meaning. It makes it easy to say things more economically, but, as in families, it also makes it far easier for minor discord or misunderstandings to assume greater significance than they warrant. This long-term connection (and often familiarity) calls for deftness and subtlety from lawyers, placing a premium on the wise silence and the subtle adjustment over the grand gesture.

When they consider bench trials, if they do at all, many observers—and even participants—see mainly the restraints the form of the trial imposes upon lawyers. As with many classes of performance, however, the restraints, when properly understood, merely channel and need not thwart the inspiration of creative practitioners.<sup>268</sup> Although different in identifiable ways from what happens with juries, the process of judgment that takes place within bench trials retains the core human quality of working through narrative. This Article has shown how lawyers can develop stories that draw power from the unique characteristics of bench trial communication. Subtly adapting conventional advocacy styles, lawyers can lift bench trials from the cultural oblivion in which they have long operated and improve the chances that judges will appreciate the power of their clients' cases.

---

<sup>268</sup> See VIOLA SPOLIN, *IMPROVISATION FOR THE THEATER* 6 (1963) ("[T]he acceptance of all the imposed limitations creates the playing.").